Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

GERARD JOSEPH HESS,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Fourth Supreme Judicial District Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Article 42.12 § 5(b), Texas Code of Criminal Procedure, offends the Fourteenth Amendment to the United States Constitution, on its face or as applied?

PARTIES TO THE PROCEEDING

1. GERARD JOSEPH HESS is the Petitioner.

2. THE STATE OF TEXAS is the Respondent.

3. Petitioner was represented in the trial court at his plea and punishment hearing by Mr. Eduardo Saenz and Mr. Vincent D. Callahan, attorneys in San Antonio, Texas.

4. The State of Texas was represented in the trial court at the plea and punishment hearing by Ms. Molly Cavazos, an Assistant District Attorney for Bexar County, Texas.

5. Petitioner was represented at the hearing held in the trial court on the State's motion to adjudicate guilt, by Ms. Nancy B. Barohn, an attorney in Dallas, Texas.

6. The State of Texas was represented at the hearing held in the trial court on the motion to adjudicate guilty by Ms. Adriana Biggs, an Assistant District Attorney for Bexar County, Texas.

7. Petitioner was represented in his direct appeal by Ms. Nancy B. Barohn, and Ms. Laura Greenberg, an attorney in San Antonio, Texas.

8. The State of Texas was represented in the appellate court by Ms. Mary Beth Welsh, an Assistant District Attorney for Bexar County, Texas.

9. Petitioner is represented in this Honorable Court by Ms. Nancy B. Barohn and Ms. Laura Greenberg.

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OPINION BELOW

The unpublished opinion of the Court of Appeals, styled *Gerard Joseph Hess v. State of Texas*, No. 04-96-00478-CR, was entered on October 29, 1997, and is reproduced in the Appendix at 1-6.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the Court of Appeals for the Fourth Supreme Judicial District of Texas was entered on October 29, 1997. A motion for rehearing and a motion for rehearing by the court en banc were denied by the Fourth Court of Appeals on January 26, 1998. Appendix at 7-9. A *Petition For Discretionary Review* was filed in the Texas Court of Criminal Appeals, Texas' court of last resort, and was refused on September 23, 1998. Appendix at 10. This petition is filed within ninety days after entry of the order denying discretionary review in the Texas Court of Criminal Appeals. SUP.CT.R. 13.1.

STATUTE INVOLVED

Article 42.12 § 5(b), Texas Code of Criminal Procedure, provides in pertinent part that:

> On violation of a condition of community supervision imposed under Subsection (a) of this section, the defendant may be arrested and detained as provided in Section 21 of this article. The defendant is entitled to a hearing limited to the determination by the court of whether it

> proceeds with an adjudication of guilt on the original charge. No appeal may be taken from this determination. After an adjudication of guilt, all proceedings, including assessment of punishment, pronouncement of sentence, granting of community supervision, and defendant's appeal continue as if the adjudication of guilt had not been deferred . . . .

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part that:

> . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

In 1993, Petitioner Gerard Joseph Hess was indicted by a Bexar County, Texas, grand jury for sexual assault, in violation of § 22.011 of the Texas Penal Code. In 1995, Petitioner entered a plea of nolo contendere to the charge and was placed on deferred adjudication community supervision (hereinafter "probation") for a term of ten years. As a condition of probation, Petitioner was required to attend therapy for sex offenders through the South Texas Offender's Program.

Subsequently, the State of Texas filed a motion styled, *Motion To Adjudicate Guilt And To Revoke Community*

Supervision in which it alleged that Petitioner had violated the terms and conditions of his probation by: 1) failing to report in November, 1995; 2) falling behind in the payment of fees, fines, and court costs; and, 3) failing to comply with the instructions of the South Texas Offender Program, which resulted in his termination from that program, in violation of Probation Condition No. 13R.

1. Proceedings In The Trial Court.

A hearing on the State's motion was held in 1997. At the hearing, the State specifically abandoned all allegations against Petitioner except the allegation that he had violated Condition No. 13R regarding his termination from the treatment program. Petitioner pleaded "Not True" to the State's sole allegation of probation violation. During the hearing, Petitioner challenged the State's evidence; objected to the denial of his right to confront and cross-examine adverse witnesses; and objected to other inadmissible testimony. Petitioner offered evidence in his own behalf, including testimony from a qualified sexual offender therapist who testified that Petitioner had been placed in an inappropriate treatment group at the South Texas Offender Program.[1] Although the State adduced ***no***

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[1] Petitioner had been placed in a group for child abusers when the underlying facts of his case involved a claim of "date rape". The therapist who testified for Petitioner had evaluated him prior to the adjudication hearing, and informed the court that he would accept Petitioner into his own treatment program where he would be placed in a group dealing with inappropriate sexual behavior among adults.

evidence at the hearing that Petitioner had failed to follow any instruction of the South Texas Offender's Program – as it had alleged in its *Motion To Adjudicate Guilt And Revoke Community Supervision* – the trial court adjudicated him guilty of sexual assault, and sentenced him to ten years' confinement in the Institutional Division of the Texas Department of Criminal Justice.

2. Petitioner Sought Redress In The Intermediate Appellate Court.

Petitioner sought to appeal the trial court's decision to revoke his probation. Petitioner raised four issues in his appeal: 1) that the State failed to prove that he had violated Condition No. 13R of his probation; 2) that his probation was revoked in the absence of minimum standards of Due Process;[2] 3) that the trial court abused its discretion in revoking his probation under the facts of the case; and, 4) that Article 42.12 § 5(b) unconstitutionally deprived him of Due Process and Equal Protection of the Law.

The Fourth Court of Appeals dismissed Petitioner's appeal for lack of jurisdiction. Appendix at 1-6. Dismissing Petitioner's first and third points of error, the court of appeals had this to say:

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[2] More particularly, Petitioner contended that the trial court had denied his right to confront and cross-examine the key adverse witness against him; and that, though the trial court found that he had violated the "***conditions***" of his probation, it refused to make fact-findings as to the evidence relied on, and the reasons for revoking Petitioner's probation, despite his oral and written requests.

> Article 42.12 of the Texas Code of Criminal Procedure governs deferred adjudication. It provides:
>
> > The defendant is entitled to a hearing limited to the determination by the court of whether it proceeds with an adjudication of guilt on the original charge. ***No appeal may be taken from this determination.***
>
> TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5(b) (Vernon Supp. 1997) (emphasis added). The Texas Court of Criminal Appeals adheres to the literal meaning of this article. *See Phynes v. State*, 828 S.W.2d 1, 2 (Tex.CrimApp. 1992). Accordingly, we dismiss Hess's first and third points for lack of jurisdiction.

Appendix at 3.

Similarly, the court of appeals dismissed Petitioner's constitutional claims, including his challenge to the constitutionality of Article 42.12 § 5(b), itself:

> As stated in our discussion of points one and three, Article 42.12, section 5(b) mandates that no appeal may be taken from the determination to adjudicate guilt. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5(b). This applies to claims of constitutional violations. (Citations omitted.) Accordingly, we dismiss points two and four on the grounds that Article 42.12 prevents us from considering even alleged constitutional violations.

Appendix at 4-5.

Last, the court of appeals noted that Petitioner's constitutional attack on Article 42.12 § 5(b) would have failed even if the court had jurisdiction of the matter since

"[n]either the United States nor the Texas Constitutions guarantee the right to appeal a criminal conviction. *See Phynes v. State*, 828 S.W.2d at 2 n.3 (citing *McKane v. Durston*, 153 U.S. 684, 687-88 (1984))". Appendix at 5. Accordingly, the court

> . . . decline[d] Hess's request that we rule contrary to the opinions of the courts whose precedent we are bound to follow.

Appendix at 5-6.

Petitioner re-urged his federal constitutional claims, including his attacks on the constitutionality of Article 42.12 § 5(b), in his motions for rehearing in the Fourth Court of Appeals, without success. Appendix at 7-9.

3. Petitioner Sought Discretionary Review Of His Constitutional Challenges In The Texas Court of Criminal Appeals, Texas' Court Of Last Resort.

Petitioner timely filed a *Petitioner For Discretionary Review* in the Texas Court of Criminal Appeals, Texas' court of last resort in criminal cases, in which he asked the court to reach his constitutional claims, including his challenge to Article 42.12 § 5(b). The petition was refused without opinion on September 23, 1998. Appendix at 10.

REASONS FOR GRANTING THE WRIT

In reliance on decisions of the Texas Court of Criminal Appeals, Texas' court of last resort, the Court of Appeals for the Fourth Supreme Judicial District of Texas has decided important questions of federal law in a way

that conflicts with relevant decisions of this Court. *Morrissey v. Brewer*, 408 U.S. 482, 92 S.Ct. 2593, 2601, 33 L.Ed.2d 484 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973); *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed.2d 891 (1956); *Lindsey v. Normet*, 405 U.S. 56, 77, 92 S.Ct. 862, 876, 31 L.Ed.2d 36 (1972); *Rinaldi v. Yeager*, 384 U.S. 305, 310, 86 S.Ct. 1497, 1500, 16 L.Ed.2d 577 (1966). Sup.Ct.R. 10(c).

I. **WHETHER ARTICLE 42.12 § 5(b), TEXAS CODE OF CRIMINAL PROCEDURE, UNCONSTITUTIONALLY DEPRIVES DEFERRED ADJUDICATION PROBATIONERS OF A *MORRISSEY V. BREWER* HEARING ON THE ISSUE OF VIOLATION, PRIOR TO REVOCATION, CONTRARY TO THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT?**

II. **WHETHER ARTICLE 42.12, TEXAS CODE OF CRIMINAL PROCEDURE, DEPRIVES DEFERRED ADJUDICATION PROBATIONERS OF DUE PROCESS AND THE EQUAL PROTECTION OF THE LAW BY DEPRIVING THEM OF A RIGHT TO APPEAL A TRIAL COURT'S REVOCATION DECISION?**

A. Introduction.

This Court has said that, while States are free to enact whatever procedures they choose, a State is not free to establish a procedure which infringes upon a federal constitutional guarantee. *Burgett v. Texas*, 389 U.S. 109, 113-14, 88 S.Ct. 258, 261 (1967). One federal constitutional guarantee, embodied in the Fourteenth Amendment's Due Process Clause, is that a person cannot be deprived of his liberty interest in probation or parole in the

absence of a finding of violation, and in the absence of minimum standards of Due Process. *Morrissey v. Brewer*, 408 U.S. 482, 92 S.Ct. 2593, 2601, 33 L.Ed.2d 484 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973).[3] Similarly, under the Fourteenth Amendment, a State, after establishing an avenue of appellate review, must keep that avenue free of unreasoned distinctions that impede open and equal access to the courts. *Griffin v. Illinois*, 351 U.S. 12, 24, 76 S.Ct. 585, 589, 100 L.Ed.2d 891 (1956); *Rinaldi v. Yeager*, 384 U.S. 305, 310, 86 S.Ct. 1497, 1500, 16 L.Ed.2d 577 (1966); *M.L.B. v. S.L.J.*, 117 S.Ct. 555, 567 (1996).

We contend that Article 42.12 § 5(b), Texas Code of Criminal Procedure, offends the Due Process and Equal Protections Clauses of the Fourteenth Amendment because it deprives one class of probationer – those persons placed on probation following deferral of a finding of guilt – a hearing prior to revocation in conformity with the requirements of *Morrissey* and *Gagnon*, and a right to seek redress through direct appeal.

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[3] Because revocation of an individual's probation or parole inflicts a "grievous loss", the State cannot terminate that interest in the absence of minimum standards of Due Process. To comport with Due Process in a revocation setting, a State must, at a minimum: a) provide written notice of the claimed violations; b) disclose to the individual the evidence against him; c) provide an opportunity to be heard in person and to present witnesses and documentary evidence; d) accord the right to confront and cross-examine adverse witnesses; e) provide a neutral and detached hearing body; and, f) provide a written statement by the factfinders as to the evidence relied on and the reasons for revoking parole. *Morrissey*, 92 S.Ct. at 2604, *Gagnon*, 93 S.Ct. 1761.

B. Texas Law.

In Texas, all aspects of community supervision (probation) are governed by Article 42.12, Texas Code of Criminal Procedure. Appendix at 11-75. Under the statute, a person's eligibility for court-ordered probation depends, primarily, on the length of the underlying sentence,[4] and the nature of the offense charged.[5] In Texas practice, a person charged with an offense enumerated in Art. 42.12 § 3g may not receive "regular" probation from the court, but may still receive court-ordered probation where the court defers a finding of guilt.[6] Art. 42.12 § 5. Appendix at 16-20. Of course, a trial court may defer a finding of guilt, and place a defendant on probation, for any offense – not simply those offenses enumerated in Art. 42.12 § 3g. Thus, Texas has created two types of probationers, *viz.*, "regular" probationers, who are placed on probation following a finding of guilt by either a court or a jury; and "deferred adjudication" probationers, who

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[4] *See* Art. 42.12 § 3(e)(1)), Appendix at 13.

[5] *See* Art. 42.12 § 3g, Appendix at 13-4. Under Art. 42.12 § 3g(a), a court is prohibited from placing a defendant on "regular" probation if the defendant pleads guilty or nolo contendere to murder, capital murder, indecency with a child, aggravated kidnaping, aggravated sexual assault, aggravated robbery, some drug offenses, and sexual assault of a child. Appendix at 13-4.

[6] Though a court cannot place a defendant on "regular" probation for a § 3g offense, a jury can after finding the defendant guilty if the defendant has properly elected to have his punishment assessed by a jury, and is otherwise eligible. Art. 37.07 § 2(b), Tex. Code Crim. Proc.; *see also* Art. 42.12 § 4(c)(3) and (e), Appendix at 15-6.

are placed on probation by the court when a finding of guilt is deferred.

Beyond the provisions governing a person's eligibility for probation in Texas, Article 42.12 makes no distinction between "regular" and "deferred adjudication" probationers in either the terms and conditions imposed, or the manner of supervision. Unless excused by the court, both "regular" and "deferred adjudication" probationers must report to a supervision officer, and are required to abide by general and special conditions during the probationary term. Art. 42.12 §§ 11-14, 16-19; Appendix at 32-56, 60-8.

Though terms of "regular" and "deferred adjudication" probation are identical in their content and administration, dramatically different procedures apply if there is a claim of violation. In this event, Article 42.12 affords "regular" probationers a hearing in conformity with the requirements of *Morrissey v. Brewer* and *Gagnon v. Scarpelli*,[7] after which the judge may continue, extend, modify, or revoke the probation. Art. 42.12 § 21(b); Appendix at 70. If revoked and sentenced to a term of confinement, "regular" probationers are afforded a right to appeal the revocation decision. Art. 42.12 § 23(b); Appendix at 75. The right to appeal the revocation decision affords "regular" probationers the concomitant right to court-appointed counsel, if indigent, *Whisenant v. State*, 557 S.W.2d 102, 104 (Tex.Crim.App. 1977), and the right to bail pending resolution of the appeal, if the underlying sentence is

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[7] *See, e.g., Shaw v. State*, 622 S.W.2d 862, 863 (Tex.Crim.App. 1981); *Whisenant v. State*, 557 S.W.2d 102, 105 (Tex.Crim.App. 1977); *Wright v. State*, 640 S.W.2d 265, 269 (Tex.Crim.App. 1982).

fifteen years or less. *Id. See also* Article 44.04, Tex. Code Crim. Proc.

"Deferred adjudication" probationers, in stark contrast, are entitled to ***none*** of the foregoing protections upon a claim of violation. Termination of a "deferred adjudication" probationer's liberty interest in probation is governed solely by Art. 42.12 § 5(b), *Phynes v. State*, 828 S.W.2d 1, 2 (Tex.Crim.App. 1992); *Olowosuko v. State*, 826 S.W.2d 940, 942 (Tex.Crim.App. 1992), which provides in pertinent part that:

> On violation of a condition of community supervision imposed under Subsection (a) of this section, the defendant may be arrested and detained as provided in Section 21 of this article. ***The defendant is entitled to a hearing limited to the determination by the court of whether it proceeds with an adjudication of guilt on the original charge. No appeal may be taken from this determination.*** After an adjudication of guilt, all proceedings, including assessment of punishment, pronouncement of sentence, granting of community supervision, and defendant's appeal continue as if adjudication of guilt had not been deferred.

Appendix at 18 (emphasis added).

For the reasons which follow, we contend that Article 42.12 § 5(b), either on its face or as construed, deprives "deferred adjudication" probationers of the right to Due Process and Equal Protection of the law, in violation of the Fourteenth Amendment.

C. Argument And Authorities.

1. Deferred Adjudication Probationers Are Denied A Hearing On The Issue Of Violation, Contrary To Morrissey v. Brewer and Gagnon v. Scarpelli.

Under Article 42.12 § 5(b), a "deferred adjudication" probationer has no right, prior to the termination of his liberty, to a hearing in conformity with the requirements of *Morrissey* and *Gagnon*. Rather, under Art. 42.12 § 5(b), the ***only*** hearing afforded a "deferred adjudication" probationer is the one "***limited*** to the determination by the court of whether it proceeds with an adjudication of guilt on the original charge. (emphasis added)". One intermediate appellate court has explained the nature of the hearing afforded "deferred adjudication" probationers in this way:

> Although violation of the probation received under a deferred adjudication is a basis for proceeding to an adjudication of guilt, the trial court does not revoke the defendant's probation in the hearing. It simply adjudicates guilt and assesses punishment as if the deferred adjudication had never occurred.

Burger v. State, 920 S.W.2d 433, 437 (Tex.App. – Houston [1st Dist.] 1996). We contend that, where the only hearing provided a "deferred adjudication" probationer is not directed to the question of whether he has, in fact, violated a condition of supervision, it follows perforce that the probationer is denied a hearing consistent with the requirements of *Morrissey* and *Gagnon*.

That Art. 42.12 § 5(b) is burdened by constitutional infirmities has not gone without remark. In a separate

opinion, concurring in the dismissal of a "deferred adjudication" probationer's appeal, Judge Morris Overstreet of the Court of Criminal Appeals, joined by Judge Charles Baird, expressed concern over the unequal treatment of "deferred adjudication" probationers:

> I wholeheartedly concur with the majority that the current state of the law in Texas requires dismissal of all of appellant's points because of the prohibition against appealing a determination to proceed with an adjudication of guilt. I write merely to express my concern that such a prohibition might have some potential constitutional problems.
>
> * * *
>
> I am concerned about the possible unfettered discretion of trial courts in deciding to proceed with an adjudication of guilt irrespective of whether a violation of the terms and conditions of probation has been shown. A defendant given "regular" probation certainly has a right to appeal a revocation of his probated sentence. Such a "regular" probation can only be revoked based upon a violation which the trial court finds proven by a preponderance of the evidence. (Citations omitted.) Certainly a deferred adjudication probationer should be entitled to the same protection from any such whimsical capricious revocation.
>
> The treatment of one placed on deferred adjudication probation as compared to one

> placed on "regular" probation could be subject to a legitimate equal protection violation claim. As appellant makes no such claim, it is proper for this Court to refrain from addressing such. Nevertheless, I write simply to express my concerns for a potential problem. Hopefully, in the not too distant future, this Court will address this potential problem.

Olowosuko v. State, 826 S.W.2d 940, 942-43 (Tex.Crim.App. 1992) (OVERSTREET, J., concurring). Judge Overstreet's expression of hope that the Court of Criminal Appeals would address his concerns remains unfulfilled to this day.

2. Article 42.12 § 5(b) Deprives "Deferred Adjudication" Probationers Of The Right To Seek Redress For Constitutional Violations Through Direct Appeal, Offending Both The Equal Protection And Due Process Clauses Of The Fourteenth Amendment.

As noted above, "regular" probationers are afforded the right to appeal the revocation decision if it results in a jail or prison sentence, and enjoy the right to appointed counsel if indigent, and bond pending the appeal. Art. 42.12 § 23(b); Appendix at 75. "Deferred adjudication" probationers, on the other hand, have no right to appeal any aspect of the proceedings which result in the termination of probation, including the constitutionality of the statute, itself. *Andrade v. State*, 963 S.W.2d 832, 833 (Tex.App. – Fort Worth, 1998); *Elizondo v. State*, 861 S.W.2d 294, 295 (Tex.App. – San Antonio, 1993); *Keller v. State*, 854 S.W.2d 224, 225 (Tex.App. – Beaumont, 1993). Denied a direct appeal, indigent "deferred adjudication"

probationers – like Petitioner[8] – must seek relief in a post-conviction habeas corpus proceeding under Article 11, Tex. Code Crim. Proc.; *see also Olowosuko v. State*, *supra*, 826 S.W.2d at 942, n.2; *Rodriguez v. State*, 972 S.W.2d 135, 139 (Tex.App. – Texarkana, 1998); *Haller v. State*, 933 S.W.2d 262 (Tex.App. – Corpus Christi, 1996). This procedure, we suggest, is not an adequate substitute for direct appeal. Unlike a "regular" probationer, who may seek bond pending resolution of his appeal, a "deferred adjudication" probationer must be in custody as a condition precedent to the filing of a post-conviction writ application. Art. 11.01, Tex. Code Crim. Proc. *See also Rodriguez v. Court of Appeals*, 769 S.W.2d 554, 556 (Tex.Crim.App. 1989); *Ex parte Renier*, 734 S.W.2d 349, 351 (Tex.Crim.App. 1987). Though indigent, an applicant seeking relief for constitutional violations in a post-conviction proceeding does not have the right to appointed counsel in non-death felony cases. *Cf.* Art. 11.071 § 2, Tex. Code Crim. Proc.[9] This being so, indigent "deferred adjudication" probationers, adjudicated guilty by the trial

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[8] Petitioner was represented at his original plea proceeding by court-appointed counsel. Petitioner's sister paid a nominal fee for his representation at the adjudication proceeding. Petitioner was granted *in forma pauperis* status in his appeal to the Fourth Court of Appeals, and was represented by appointed counsel there. Petitioner accumulated sufficient funds to pay the associated costs of this petition.

[9] Article 11.071 governs post-conviction writ applications in capital cases. In 1995, the Texas legislature amended Article 11.071 to provide for the first time the appointment of counsel in death penalty habeas corpus cases. A similar amendment has not been extended to non-death felony habeas applicants. Article 11.07, Tex. Code Crim. Proc.

court on a claim of violation and sent to prison, must by and large seek redress for constitutional violations – if at all – on a *pro se* basis. Thus, under Texas' system, "deferred adjudication" probationers are regularly and routinely adjudicated guilty and sent to prison in the absence of minimum standards of Due Process, and in the absence of the opportunity to seek redress through direct appeal. *See, e.g., Phynes v. State*, 828 S.W.2d 1 (Tex.Crim.App. 1992) (defendant adjudicated guilty and sent to prison following an adjudication hearing held in the absence of the defendant's counsel); *Olowosuko v. State*, 826 S.W.2d 940, 942 (Tex.Crim.App. 1992) (defendant precluded from appealing either the validity of a probation condition, or the State's failure to state a violation); *Elizondo v. State*, 861 S.W.2d 294, 296 (Tex.App. – San Antonio, 1993) (same); *Tillman v. State*, 919 S.W.2d 836, 837 (Tex.App. – Fort Worth, 1996) (defendant precluded from appealing though no evidence of violation); *Keller v. State*, 854 S.W.2d 224, 225 (Tex.App. – Beaumont, 1993) (defendant precluded from appealing sufficiency of the evidence used to support revocation); *Rocha v. State*, 903 S.W.2d 789, 790 (Tex.App. – Dallas, 1995) (same); *Abdallah v. State*, 924 S.W.2d 751, 753 (Tex.App. – Ft. Worth, 1996) (defendant precluded from appealing denial of the right to confront witnesses, and denial of due process of law); *Collins v. State*, 912 S.W.2d 864, 865 (Tex.App. – Beaumont, 1995) (defendant precluded from appealing trial court's refusal to grant continuance so that he could present a witness in his own behalf); *Kendall v. State*, 929 S.W.2d 509, 510 (Tex.App. – Ft. Worth, 1996) (defendant precluded from challenging constitutionality of Article 42.12 § 5(b)); *Andrade v. State*, 963 S.W.2d 832,

833 (Tex.App. – Ft. Worth, 1998) (same); *Leal v. State*, 962 S.W.2d 652 (Tex.App. – Corpus Christi, 1998) (defendant precluded from appealing claim of due process violation).[10]

By comparison, "regular" probationers have had success in setting aside trial courts' revocation decisions on direct appeal. *See, e.g., Garcia v. State*, 488 S.W.2d 448, 449 (Tex.Crim.App. 1972) (reversed where trial court's fact findings insufficient); *Bolieu v. State*, 779 S.W.2d 489, 491 (Tex.App. – Austin, 1989) (same); *Smith v. State*, 790 S.W.2d 366, 367-68 (Tex.App. – Houston [1st Dist.] 1990) (same); *Harris v. State*, 608 S.W.2d 229 (Tex.Crim.App. 1980) (revocation set aside where condition is so vague it cannot be enforced); *Mitchell v. State*, 608 S.W.2d 226 (Tex.Crim.App. 1980) (revocation set aside where the

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[10] That the denial of a direct appeal to "deferred adjudication" probationers offends Due Process has been commented on by one intermediate appellate court judge, on more than one occasion:

> The question, then, is how to insure the minimal due process guarantees mandated by the Supreme Court in *Gagnon*, when no review is permitted. Although article 42.12, section 21 requires the allegation of a violation of a condition of community supervision, article 42.12 section 5(b) permits no review. We find ourselves, then, assuring a defendant on deferred adjudication community supervision that he or she is entitled to the fundamental protections of fair play and due process, but we deprive the same defendant of any vehicle for lodging a complaint that such a guarantee was violated.

Abdallah v. State, 924 S.W.2d at 755 (DAUPHINOT, J. concurring); *Kendall v. State*, 929 S.W.2d 509, 510 (Tex.App. – Fort Worth, 1996) (DAUPHINOT, J. concurring).

State's motion failed to give adequate notice of the violation alleged); *Janssen v. State*, 473 S.W.2d 40, 41 (Tex.Crim.App. 1971) (revocation set aside where motion to revoke fails to state a violation).

Following what appeared to be an invitation from Judge Overstreet in *Olowosoku*, "deferred adjudication" probationers, like Petitioner, have sought to raise Equal Protection challenges to Art. 42.12 § 5(b) on direct appeal. While most courts have refused to review the issue, others have reached "deferred adjudication" probationers' Equal Protection challenges, and have uniformly rejected them. *See, e.g., Buchanan v. State*, 881 S.W.2d 376, 380 (Tex.App. – Houston [1st Dist.] 1994); *Rocha v. State*, 903 S.W.2d 789, 791 (Tex.App. – Dallas, 1195); *Faerman v. State*, 966 S.W.2d 843, 847 (Tex.App. – Houston [14th Dist.] 1998). The intermediate appellate courts have reasoned that, since "deferred adjudication" probationers receive a "benefit" which "regular" probationers do not – a "deferred adjudication" probationer is not found guilty by the court at the time of the plea, and will not be found guilty unless adjudicated guilty on violation of probation – the state may rationally deny this class of probationer a right to appeal. *Rocha, supra*, 903 S.W.2d at 791; *Faerman, supra*, 966 S.W.2d at 846; *Buchanan*, 881 S.W.2d at 380. Hence, these courts have reasoned, denying "deferred adjudication" probationers a right of appeal "is rationally related to the legitimate state interest of conserving resources". *Id.* The court in *Rocha* explained the trade-off in this way:

> Both the State and the defendant receive benefits from deferred adjudication: (1) both

> sides avoid the burden of a trial; (2) the defendant is given a chance to avoid a conviction; and (3) the State conserves scarce judicial and prosecutorial resources.

Rocha, 903 S.W.2d at 791. *Accord Faerman*, 966 S.W.2d at 846; *Buchanan*, 881 S.W.2d at 380.

We suggest that the reasoning of the intermediate appellate courts will not withstand scrutiny. First, it is self-evident that the "benefit" of avoiding "the burden of a trial" is inherent in any case resolved through plea bargaining – whether the defendant receives "regular" or "deferred adjudication" probation, or a sentence to serve. Second, the "benefit" afforded "deferred adjudication" probationers – to avoid conviction upon satisfactory completion of the probationary term – is extended to "regular" probationers as well. To be sure, Art. 42.12 § 5(c) provides for the dismissal of the underlying case where the "deferred adjudiciation" probationer successfully completes the term of supervision:

> (c) On expiration of a community supervision period imposed under Subsection (a) of this section, if the judge has not proceeded to adjudication of guilt, the judge shall dismiss the proceedings against the defendant and discharge him.

A dismissal and discharge under Art. 42.12 § 5(c), however, does not relieve the defendant of all disabilities. Thus, under § 5(c), the dismissed case may yet serve as the basis for enhanced punishment under Texas Penal Code § 12.42(g), if the defendant is subsequently convicted. Appendix at 19. Likewise, if convicted of a subsequent offense, the dismissed case is admissible against

the defendant on the issue of punishment before a court or jury. Art. 42.12 § 5(c)(1); Appendix at 19. The dismissed case places a burden on a defendant seeking to obtain or renew a license from the Texas Department of Human Services under the Human Resources Code, and through the Interagency Council on Sex Offender Treatment. Art. 42.12 § 5(c)(2) and (3); Appendix at 19. Finally, if subsequently convicted of a state jail felony, the dismissed case exposes the defendant to a longer term of confinement imposed as a condition of probation. Art. 42.12 § 15(d); Appendix at 57.

"Regular" probationers who successfully complete their term of supervision are afforded similar relief from the underlying conviction, but with fewer disabilities:

> **Sec. 20. (a)** * * * Upon satisfactory fulfillment of the conditions of community supervision, the judge, by order duly entered, shall amend or modify the original sentence imposed, if necessary, to conform to the community supervision period and shall discharge the defendant. ***If the judge discharges the defendant under this section, the judge may set aside the verdict or permit the defendant to withdraw his plea, and shall dismiss the accusation, complaint, information, or indictment against the defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted or to which he has pleaded guilty . . .***

Art. 42.12 § 20(a), Appendix at 68-9 (emphasis added). After dismissal and discharge under Art. 42.12 § 20, the fact of the prior conviction must be made known to the

judge if the defendant is again convicted of a criminal offense, and may be considered by the Texas Department of Human Services if the defendant seeks issuance or renewal of a license under the Human Resources Code. Art. 42.12 § 20(a)(1) and (2); Appendix at 69. Viewed from this perspective, the "benefit" afforded a "deferred adjudication" probationer is "different" from that afforded a "regular" probationer only during the course of the probation.

Finally, the articulated interest in conserving scarce judicial and prosecutorial resources presents a more interesting question. At the trial level, of course, both judicial and prosecutorial resources are saved in any case resolved through plea bargaining regardless of the ultimate sentence. But does denying "deferred adjudication" probationers a right of appeal truly conserve judicial resources? We think not, at least in the abstract. By requiring that "deferred adjudication" probationers seek redress through post-conviction writ applications, the entire burden of review is shifted from the fourteen intermediate appellate courts to the Court of Criminal Appeals, itself, as it is the only court authorized to issue the writ after final conviction. Art. 11.07 § 3(a); *see also Ex parte Alexander*, 685 S.W.2d 57, 60 (Tex.Crim.App. 1985). Though bypassing the intermediate appellate courts, post-conviction writ applications also burden the trial courts where the applications must be filed, evidence heard, and findings of fact made. Art. 11.07 § 3(b) and (d). Denial of "deferred adjudication" probationers a right of appeal does not so much conserve judicial

resources, we suggest, as reallocate them. For all of these reasons, we contend that the courts' articulated ju ıfication for denying "deferred adjudication" probationers a right of appeal is not rationally related to the state's articulated interest in conserving judicial resources.

Sadly, if judicial resources are, in fact, being conserved by denying "deferred adjudication" probationers a right of appeal, it is only because the vast majority of these probationers, once sent to prison, lack the resources to retain counsel to prosecute a post-conviction writ. This Court has held that, though a state is not constitutionally obligated to create appellate remedies, yet having done so, it may not arbitrarily deny them to a particular class of litigants. *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed.2d 891 (1956); *Lindsey v. Normet*, 405 U.S. 56, 77, 92 S.Ct. 862, 876, 31 L.Ed.2d 36 (1972). *Accord Adsani v. Miller*, 139 F.3d 67, 76 (2d Cir. 1998) ("principles of due process and equal protection mandate that an appeal process established by statute be fairly and equally accessible to all litigants). And, elsewhere:

> This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that only impede open and equal access to the courts.

Rinaldi v. Yeager, 384 U.S. 305, 310, 86 S.Ct. 1497, 1500, 16 L.Ed.2d 577 (1966). Indeed, this Court's cases regarding access to the judicial process reflect both equal protection and due process concerns. *M.L.B. v. S.L.J.*, 117 S.Ct. 555,

567 (1996). We believe that the interest of "deferred adjudication" probationers – many of whom, like Petitioner, are indigent – in obtaining redress through direct appeal for the improper or unconstitutional termination of their liberty is a substantial one, the denial of which cannot be justified by the state's desire to cut its workload.

3. The Plain Language Of Article 42.12 § 5(b) Need Not Compel An Unconstitutional Construction.[11]

On its face, Art. 42.12 § 5(b) makes no provision for a hearing to determine whether a defendant has, in fact, violated a condition of probation. If Art. 42.12 § 5(b) is to withstand constitutional challenge, we believe, it must be read in a way which affords a probationer the hearing to which he is entitled under *Morrissey* and *Gagnon* before his liberty interest in community supervision is terminated. Under the express language of Article 42.12 § 5(b), a trial court's decision to proceed with an adjudication of guilt may be triggered only "*[o]n violation* of a condition

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[11] Both state and federal decisional authority hold that a court's duty is to adopt the construction of a statute which does not give rise to "grave and doubtful constitutional questions." *United States ex rel. Attorney General v. Delaware v. Hudson Co.*, 213 U.S. 408 (1909); *United States v. LaFranca*, 282 U.S. 568, 574 (1931), *quoting*, *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916); *Townsend v. State*, 427 S.W.2d 55, 62 (Tex.Crim.App. 1968); *Smith v. State*, 898 S.W.2d 838, 847 (Tex.Crim.App. 1995); *State v. Garcia*, 823 S.W.2d 793, 799 (Tex.App. – San Antonio, 1992); *Wentworth v. Meyer*, 837 S.W.2d 148, 154 (Tex.App. – San Antonio, 1992).

of community supervision" (emphasis added). This sentence could be read to require that a violation hearing be held under §§ 21 and 22 of Article 42.12 as a predicate to a § 5(b) adjudication hearing. Though these inquiries are separate, there would appear to be no reason why a § 21 and a § 5(b) hearing could not be held concurrently. Under this construction, a defendant would still be precluded from appealing the adjudication decision under § 5(b) – that is, the decision whether to enter a finding of guilt – but would be permitted to seek redress for constitutional or procedural violations occurring in the revocation portion of the hearing under § 23(b), in the same way as "regular" probationers.

If, however, the Court of Criminal Appeals' interpretation of Art. 42.12 § 5(b) is correct, then the statute is unconstitutional on its face, and this Court should declare it so.

CONCLUSION

FOR THESE REASONS, Petitioner respectfully prays that this Honorable Court will grant certiorari to review the decision of the Court of Appeals for the Fourth Supreme Judicial District of Texas in this case.

Respectfully submitted,

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Counsel for Petitioner,
Gerard Joseph Hess

Court of Appeals
Fourth Court of Appeals District of Texas
San Antonio
* * * **[LOGO]** * * *

OPINION

No. 04-96-00478-CR

Gerard Joseph **HESS**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 175th Judicial District Court, Bexar County, Texas
Trial Court No. 93-CR-6634
Honorable Mary Román, Judge Presiding

Opinion by: Paul W. Green, Justice

Sitting: Catherine Stone, Justice
Paul W. Green, Justice
Karen Angelini, Justice

Delivered and Filed: October 29, 1997

DISMISSED FOR LACK OF JURISDICTION

This appeal arises from a revocation of deferred adjudication probation originally imposed pursuant to a plea agreement. Following revocation, Gerard Joseph Hess was adjudicated for sexual assault and sentenced to a term of confinement. In four points of error, Hess challenges the trial court's decision to revoke, argues the revocation was in violation of his right to due process, and urges us to find Article 42.12, section 5(b) of the Texas Code of Criminal Procedure unconstitutional.

Because we lack jurisdiction to entertain these questions, we dismiss.

Background

A grand jury indicted Hess for sexual assault, and on March 21, 1995, he pled nolo contendere pursuant to a plea agreement with the State, which recommended deferred adjudication. At sentencing on May 19, 1995, the court followed the State's recommendation and ordered deferred adjudication probation (hereinafter "probation") for a term of ten years plus a $1,000 fine. The court further imposed restrictions on Hess, including sex offender counseling, random drug testing, and restitution.

On February 27, 1996, the court heard the State's motion to revoke Hess's probation. In support of its motion, the State alleged, among other things, that Hess was expelled from his treatment program and was delinquent in making his payments for restitution, court costs, and attorney's fees. Hess entered a plea of "not true" and offered evidence in his own behalf. At the close of argument, the court revoked Hess's probation, adjudicated him guilty, and sentenced him to ten years confinement plus a $1,000 fine.

Hess timely filed a motion for new trial, which was overruled by operation of law. He appealed and further requested we abate his appeal in order for the trial court to conduct an evidentiary hearing on his motion for new trial. We granted Hess's request and the trial court heard his motion on January 16, 1997. The trial court denied his motion, and his appeal was reinstated.

Arguments on Appeal

1. The Trial Court's Decision to Revoke

Hess argues, in his first and third points of error, the trial court abused its discretion by revoking his probation because the evidence presented at his hearing was insufficient to support the court's decision. In response, the State urges we dismiss these points for lack of jurisdiction because, under Texas law, no one may appeal a trial court's decision to adjudicate guilt.

Article 42.12 of the Texas Code of Criminal Procedure governs deferred adjudication. It provides:

> The defendant is entitled to a hearing limited to the determination by the court of whether it proceeds with an adjudication of guilt on the original charge. *No appeal may be taken from this determination.*

TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5(b) (Vernon Supp. 1997) (emphasis added). The Texas Court of Criminal Appeals adheres to the literal meaning of this article. *See Phynes v. State*, 828 S.W.2d 1, 2 (Tex.Crim.App.1992). Accordingly, we dismiss Hess's first and third points for lack of jurisdiction.

Even if the Code of Criminal Procedure permitted us to consider an appeal from a court's decision to revoke and adjudicate, we lack jurisdiction over Hess's sufficiency claim under the Texas Rules of Appellate Procedure. Rule 25.2(b)(3) (formerly Rule 40(b)(1)) limits the issues that Hess may present on appeal. TEX. R. APP. P. 25.2(b)(3). The rule provides:

> [I]f the appeal is from a judgment rendered on the defendant's plea of guilty or nolo contendere under Code of Criminal Procedure 1.15, and the punishment assessed did not exceed the punishment recommended by the prosecutor and agreed to by the defendant, the notice must:
>
> (A) specify that the appeal is for a jurisdictional defect;
>
> (B) specify that the substance of the appeal was raised by written motion and ruled on before trial; or
>
> (C) state that the trial court granted permission to appeal.

TEX. R. APP. P. 25.2(b)(3); *see Lyon v. State*, 872 S.W.2d 732, 736 (Tex.Crim.App.1994).

At Hess's plea, the State recommended deferred adjudication, pursuant to a plea agreement. The trial court's imposition of a ten-year sentence at Hess's adjudication did not exceed the bounds of the plea agreement. *See Watson v. State*, 924 S.W.2d 711, 714 (Tex.Crim. App.1996). As a result, Hess may appeal only jurisdictional defects, pretrial matters raised and ruled on, and issues for which the trial court granted permission to appeal. Hess's claim of insufficient evidence lies outside this realm of issues. *See Montalbo v. State*, 885 S.W.2d 160, 161 (Tex.Crim.App.1994).

2. Constitutional Claims

In points of error two and four, Hess contends his probation was revoked in violation of his due process rights under the constitutions of both the United States

and the State of Texas. Further, he urges us to declare Article 42.12, section 5(b) of the Code of Criminal Procedure unconstitutional on the grounds that it violates both equal protection and due process guarantees both on its face and as applied. The State argues that the article is constitutional but that we should dismiss for lack of jurisdiction.

As stated in our discussion on points one and three, Article 42.12, section 5(b) mandates that no appeal may be taken from the determination to adjudicate guilt. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5(b). This applies to claims of constitutional violations. *See Elizondo v. State*, 861 S.W.2d 294, 295 (Tex.App. – San Antonio 1993, no pet.) (dismissing defendant's claim that adjudication hearing and probation revocation were in violation of due process rights under the United States and Texas Constitutions); *Keller v. State*, 854 S.W.2d 224, 225 (Tex.App. – Beaumont 1993, pet. ref'd) (dismissing claim alleging that article 42.12, § 5(b) violated due process and equal protection under the United States and Texas Constitutions); *Richardson v. State*, 847 S.W.2d 433, 433-34 (Tex.App. – Fort Worth 1993, no pet.) (same). Accordingly, we dismiss points two and four on the grounds that Article 42.12 prevents us from considering even alleged constitutional violations.

We note, however, that Hess's constitutional attack on article 42.12, § 5(b) would fail. Neither the United States nor Texas Constitutions guarantee the right to appeal a criminal conviction. *See Phynes*, 828 S.W.2d at 2 n. 3 (citing *McKane v. Durston*, 153 U.S. 684, 687-88 (1894)). In considering the constitutionality of a New York statute governing the appealability of a court's bail

determination, the United States Supreme Court stated, "[W]hether an appeal should be allowed, and if so, under what circumstances or on what conditions, are matters for each state to determine for itself." *McKane*, 153 U.S. at 688. Since the Texas Constitution makes no guarantee of the right to appeal a criminal conviction, only the legislature may provide such a right. *Phynes*, 828 S.W.2d at 2. "It naturally follows that when a legislative enactment says an accused may not appeal a determination to adjudicate, there is no right to do so." *Id.; see also Tillman v. State*, 919 S.W.2d 836, 838 (Tex.App. – Fort Worth 1996, pet. ref'd). We decline Hess's request that we rule contrary to the opinions of the courts whose precedent we are bound to follow.

Conclusion

We dismiss all points for lack of jurisdiction.

Paul W. Green, Justice

DO NOT PUBLISH

COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT
300 DOLOROSA, SUITE 3200
BEXAR COUNTY CRIMINAL JUSTICE CENTER
SAN ANTONIO, TEXAS 78205-3037
HERB SCHAEFER, CLERK

January 26, 1998

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RE: Court of Appeals Number: 04-96-00478-CR
Trial Court Case Number: 93-CR-6634

Style: Gerard Joseph Hess
v.
The State of Texas

Dear Counsel:

After examining the record in the above styled and numbered cause, the Court DENIES Appellant's Motion for Rehearing.

ORDERED the day and year above written.

Very truly yours,

HERB SCHAEFER, CLERK

/s/ Susan Baird

Susan Baird, Deputy Clerk

COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT
300 DOLOROSA, SUITE 3200
BEXAR COUNTY CRIMINAL JUSTICE CENTER
SAN ANTONIO, TEXAS 78205-3037
HERB SCHAEFER, CLERK

January 26, 1998

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RE: Court of Appeals Number: 04-96-00478-CR
Trial Court Case Number: 93-CR-6634

Style: Gerard Joseph Hess
v.
The State of Texas

Dear Counsel:

The Applicant's Motion for En Banc Consideration of Motion for Rehearing in the above styled and numbered cause has this date been DENIED.

Very truly yours,

HERB SCHAEFER, CLERK

/s/ Susan Baird
Susan Baird, Deputy Clerk

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS P.O. BOX 12308, CAPITAL STATION, AUSTIN, TEXAS 78711

[Postmarked Sep. 24, 1988]

September 23, 1998
COA#: 04-96-00478-CR
RE: Case No. 0992-98
STYLE: HESS, GERARD JOSEPH

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Troy C. Bennett, Jr., Clerk

NANCY B BAROHN
6611 HILLCREST AVE NO 214
DALLAS TX 75205-1301

CODE OF CRIMINAL PROCEDURE

Art. 42.12. Community supervision

Purpose

Sec. 1. It is the purpose of this article to place wholly within the state courts the responsibility for determining when the imposition of sentence in certain cases shall be suspended, the conditions of community supervision, and the supervision of defendants placed on community supervision, in consonance with the powers assigned to the judicial branch of this government by the Constitution of Texas. It is the purpose of this article to remove from existing statutes the limitations, other than questions of constitutionality, that have acted as barriers to effective systems of community supervision in the public interest.

Definitions

Sec. 2. In this article:

(1) "Court" means a court of record having original criminal jurisdiction.

(2) "Community supervision" means the placement of a defendant by a court under a continuum of programs and sanctions, with conditions imposed by the court for a specified period during which:

(A) criminal proceedings are deferred without an adjudication of guilt; or

(B) a sentence of imprisonment or confinement, imprisonment and fine, or confinement and fine, is probated and the imposition of sentence is suspended in whole or in part.

(3) "Supervision officer" means a person appointed or employed under Section 76.004, Government Code, to supervise defendants placed on community supervision.

(4) "Electronic monitoring" includes voice tracking systems, position tracking systems, position location systems, biometric tracking systems, and any other electronic or telecommunications system that may be used to assist in the supervision of individuals under this article.

Judge Ordered Community Supervision

Sec. 3. (a) A judge, in the best interest of justice, the public, and the defendant, after conviction or a plea of guilty or nolo contendere, may suspend the imposition of the sentence and place the defendant on community supervision or impose a fine applicable to the offense and place the defendant on community supervision.

(b) Except as provided by Subsection (f), in a felony case the minimum period of community supervision is the same as the minimum term of imprisonment applicable to the offense and the maximum period of community supervision is 10 years.

(c) The maximum period of community supervision in a misdemeanor case is two years.

(d) A judge may increase the maximum period of community supervision in the manner provided by Section 22(c) or 22A of this article.

(e) A defendant is not eligible for community supervision under this section if the defendant:

(1) is sentenced to a term of imprisonment that exceeds 10 years; or

(2) is sentenced to serve a term of confinement under Section 12.35, Penal Code.

(f) The minimum period of community supervision for a felony described by Section 13B(b) is five years and the maximum period of supervision is 10 years.

(g) A judge shall not deny community supervision to a defendant based solely on the defendant's inability to speak, read, write, hear, or understand English.

Secs. 3a to 3f. [Blank]

Limitation on Judge Ordered Community Supervision.

Sec. 3g. (a) The provisions of Section 3 of this article do not apply:

(1) to a defendant adjudged guilty of an offense under:

(A) Section 19.02, Penal Code (Murder);

(B) Section 19.03, Penal Code (Capital murder);

(C) Section 21.11(a)(1), Penal Code (Indecency with a child);

(D) Section 20.04, Penal Code (Aggravated kidnapping);

(E) Section 22.021, Penal Code (Aggravated sexual assault);

(F) Section 29.03, Penal Code (Aggravated robbery);

(G) Chapter 481, Health and Safety Code, for which punishment is increased under Section 481.134(c), (d), (e), or (f), Health and Safety Code, if it is shown that the defendant has been previously convicted of an offense for which punishment was increased under any of those subsections; or

(H) Section 22.011(a)(2), (Sexual assault); or

(2) to a defendant when it is shown that a deadly weapon as defined in Section 1.07, Penal Code, was used or exhibited during the commission of a felony offense or during immediate flight therefrom, and that the defendant used or exhibited the deadly weapon or was a party to the offense and knew that a deadly weapon would be used or exhibited. On an affirmative finding under this subdivision, the trial court shall enter the finding in the judgment of the court. On an affirmative finding that the deadly weapon was a firearm, the court shall enter that finding in its judgment.

(b) If there is an affirmative finding under Subsection (a)(2) in the trial of a felony of the second degree or higher that the deadly weapon used or exhibited was a firearm and the defendant is granted community supervision, the court may order the defendant confined in the institutional division of the Texas Department of Criminal Justice for not less than 60 and not more than 120 days. At any time after the defendant has served 60 days in the custody of the institutional division, the sentencing

judge, on his own motion or on motion of the defendant, may order the defendant released to community supervision. The institutional division shall release the defendant to community supervision after he has served 120 days.

Jury Recommended Community Supervision

Sec. 4. (a) A jury that imposes confinement as punishment for an offense may recommend to the judge that the judge suspend the imposition of the sentence and place the defendant on community supervision. A judge shall suspend the imposition of the sentence and place the defendant on community supervision if the jury makes that recommendation in the verdict.

(b) If the jury recommends to the judge that the judge place the defendant on community supervision, the judge shall place the defendant on community supervision for any period permitted under Section 3(b) or 3(c) of this article, as appropriate.

(c) A judge may increase the maximum period of community supervision in the manner provided by Section 22(c) or Section 22A of this article.

(d) A defendant is not eligible for community supervision under this section if the defendant:

(1) is sentenced to a term of imprisonment that exceeds 10 years;

(2) is sentenced to serve a term of confinement under Section 12.35, Penal Code;

(3) does not file a sworn motion under Subsection (e) of this section or for whom the jury does not enter in

the verdict a finding that the information contained in the motion is true; or -

(4) is adjudged guilty of an offense for which punishment is increased under Section 481.134(c), (d), (e), or (f), Health and Safety Code, if it is shown that the defendant has been previously convicted of an offense for which punishment was increased under any one of those subsections.

(e) A defendant is eligible for community supervision under this section only if before the trial begins the defendant files a written sworn motion with the judge that the defendant has not previously been convicted of a felony in this or any other state, and the jury enters in the verdict a finding that the information in the defendant's motion is *true*.

Deferred Adjudication; Community Supervision

Sec. 5. (a) Except as provided by Subsection (d) of this section, when in the judge's opinion the best interest of society and the defendant will be served, the judge may, after receiving a plea of guilty or plea of nolo contendere, hearing the evidence, and finding that it substantiates the defendant's guilt, defer further proceedings without entering an adjudication of guilt, and place the defendant on community supervision. A judge may place on community supervision under this section a defendant charged with an offense under Section 21.11, 22.011, or 22.021, Penal Code, regardless of the age of the victim, or a defendant charged with a felony described by Section 13B(b) of this article, only if the judge makes a

finding in open court that placing the defendant on community supervision is in the best interest of the victim. The failure of the judge to find that deferred adjudication is in the best interest of the victim is not grounds for the defendant to set aside the plea, deferred adjudication, or any subsequent conviction or sentence. After placing the defendant on community supervision under this section, the judge shall inform the defendant orally or in writing of the possible consequences under Subsection (b) of this section of a violation of community supervision. If the information is provided orally, the judge must record and maintain the judge's statement to the defendant. The failure of a judge to inform a defendant of possible consequences under Subsection (b) of this section is not a ground for reversal unless the defendant shows that he was harmed by the failure of the judge to provide the information. In a felony case, the period of community supervision may not exceed 10 years. For a defendant charged with a felony under Section 21.11, 22.011, or 22.021, Penal Code, regardless of the age of the victim, and for a defendant charged with a felony described by Section 13B(b) of this article, the period of community supervision may not be less than five years. In a misdemeanor case, the period of community supervision may not exceed two years. A judge may increase the maximum period of community supervision in the manner provided by Section 22(c) or 22A of this article. The judge may impose a fine applicable to the offense and require any reasonable conditions of community supervision, including mental health treatment under Section 11(d) of this article, that a judge could impose on a defendant placed on community supervision for a conviction that

was probated and suspended, including confinement. The provisions of Section 15 of this article specifying whether a defendant convicted of a state jail felony is to be confined in a county jail or state jail felony facility and establishing the minimum and maximum terms of confinement as a condition of community supervision apply in the same manner to a defendant placed on community supervision after pleading guilty or nolo contendere to a state jail felony. However, upon written motion of the defendant requesting final adjudication filed within 30 days after entering such plea and the deferment of adjudication, the judge shall proceed to final adjudication as in all other cases.

(b) On violation of a condition of community supervision imposed under Subsection (a) of this section, the defendant may be arrested and detained as provided in Section 21 of this article. The defendant is entitled to a hearing limited to the determination by the court of whether it proceeds with an adjudication of guilt on the original charge. No appeal may be taken from this determination. After an adjudication of guilt, all proceedings, including assessment of punishment, pronouncement of sentence, granting of community supervision, and defendant's appeal continue as if the adjudication of guilt had not been deferred. A court assessing punishment after an adjudication of guilt of a defendant charged with a state jail felony may suspend the imposition of the sentence and place the defendant on community supervision or may order the sentence to be executed, regardless of whether the defendant has previously been convicted of a felony.

(c) On expiration of a community supervision period imposed under Subsection (a) of this section, if the judge has not proceeded to adjudication of guilt, the judge shall dismiss the proceedings against the defendant and discharge him. The judge may dismiss the proceedings and discharge a defendant, other than a defendant charged with an offense described by Section 13B(b) of this article, prior to the expiration of the term of community supervision if in the judge's opinion the best interest of society and the defendant will be served. The judge may dismiss the proceedings and discharge a defendant charged with a felony described by Section 13B(b) of this article only if in the judge's opinion the best interest of society and the defendant will be served and the defendant has successfully completed at least two-thirds of the period of community supervision. Except as provided by section 12.42(g), Penal Code, a dismissal and discharge under this section may not be deemed a conviction for the purposes of disqualifications or disabilities imposed by law for conviction of an offense. For any defendant who receives a dismissal and discharge under this section:

(1) upon conviction of a subsequent offense, the fact that the defendant had previously received community supervision with a deferred adjudication of guilt shall be admissible before the court or jury to be considered on the issue of penalty;

(2) if the defendant is an applicant for a license or is a licensee under Chapter 42, Human Resources Code, the Texas Department of Human Services may consider the fact that the defendant previously has received community supervision with a deferred adjudication of guilt

under this section in issuing, renewing, denying, or revoking a license under that chapter; and

(3) if the defendant is a person who has applied for registration to provide mental health or medical services for the rehabilitation of sex offenders, the Interagency Council on Sex Offender Treatment may consider the fact that the defendant has received community supervision under this section in issuing, renewing, denying, or revoking a license or registration issued by that council.

(d) In all other cases the judge may grant deferred adjudication unless:

(1) the defendant is charged with an offense:

(A) under Section 49.04, 49.05, 49.06, 49.07, or 49.08, Penal Code; or

(B) for which punishment may be increased under Section 481.134(c), (d), (e), or (f), Health and Safety Code, if it is shown that the defendant has been previously convicted of an offense for which punishment was increased under any one of those subsections; or

(2) the defendant:

(A) is charged with an offense under Section 21.11, 22.011, or 22.021, Penal Code, regardless of the age of the victim, or a felony described by Section 13B(b) of this article; and

(B) has previously been placed on community supervision for any offense under Paragraph (a) of this subdivision.

Continuing Court Jurisdiction in Felony Cases

Sec. 6. (a) For the purposes of this section, the jurisdiction of a court in which a sentence requiring imprisonment in the institutional division of the Texas Department of Criminal Justice is imposed by the judge of the court shall continue for 180 days from the date the execution of the sentence actually begins. Before the expiration of 180 days from the date the execution of the sentence actually begins, the judge of the court that imposed such sentence may on his own motion, on the motion of the attorney representing the state, or on the written motion of the defendant, suspend further execution of the sentence and place the defendant on community supervision under the terms and conditions of this article, if in the opinion of the judge the defendant would not benefit from further imprisonment and:

(1) the defendant is otherwise eligible for community supervision under this article; and

(2) the defendant had never before been incarcerated in a penitentiary serving a sentence for a felony.

(b) When the defendant or the attorney representing the state files a written motion requesting suspension by the judge of further execution of the sentence and placement of the defendant on community supervision, and when requested to do so by the judge, the clerk of the court shall request a copy of the defendant's record while imprisoned from the institutional division of the Texas Department of Criminal Justice or, if the defendant is confined in county jail, from the sheriff. Upon receipt of such request, the institutional division of the Texas

Department of Criminal Justice or the sheriff shall forward to the judge, as soon as possible, a full and complete copy of the defendant's record while imprisoned or confined. When the defendant files a written motion requesting suspension of further execution of the sentence and placement on community supervision, he shall immediately deliver or cause to be delivered a true and correct copy of the motion to the office of the attorney representing the state.

(c) The judge may deny the motion without a hearing but may not grant the motion without holding a hearing and providing the attorney representing the state and the defendant the opportunity to present evidence on the motion.

Continuing Court Jurisdiction in Misdemeanor Cases

Sec. 7. (a) For the purposes of this section, the jurisdiction of the courts in this state in which a sentence requiring confinement in a jail is imposed for conviction of a misdemeanor shall continue for 180 days from the date the execution of the sentence actually begins. The judge of the court that imposed such sentence may on his own motion, on the motion of the attorney representing the state, or on the written motion of the defendant suspend further execution of the sentence and place the defendant on community supervision under the terms and conditions of this article, if in the opinion of the judge the defendant would not benefit from further confinement.

(b) When the defendant files a written motion with the court requesting suspension of further execution of

the sentence and placement on community supervision or when requested to do so by the judge, the clerk of the court shall request a copy of the defendant's record while confined from the agency operating the jail where the defendant is confined. Upon receipt of such request, the agency operating the jail where the defendant is confined shall forward to the court as soon as possible a full and complete copy of the defendant's record while confined.

(c) The judge may deny the motion without a hearing but may not grant a motion without holding a hearing and allowing the attorney representing the state and the defendant to present evidence in the case.

State Boot Camp Program

Sec. 8. (a) For the purposes of this section, the jurisdiction of a court in which a sentence requiring imprisonment in the institutional division of the Texas Department of Criminal Justice is imposed for conviction of a felony shall continue for 90 days from the date on which the convicted person is received into custody by the institutional division. After the expiration of 75 days but prior to the expiration of 90 days from the date on which the convicted person is received into custody by the institutional division, the judge of the court that imposed the sentence may suspend further execution of the sentence imposed and place the person on community supervision under the terms and conditions of this article, if in the opinion of the judge the person would not benefit from further imprisonment. The court shall clearly indicate in its order recommending the placement of the person in

the state boot camp program that the court is not retaining jurisdiction over the person for the purposes of Section 6 of this article. A court may recommend a person for placement in the state boot camp program only if:

(1) the person is otherwise eligible for community supervision under this article;

(2) the person is 17 years of age or older but younger than 26 years and is physically and mentally capable of participating in a program that requires strenuous physical activity; and

(3) the person is not convicted of an offense punishable as a state jail felony.

(b) On the 76th day after the day on which the convicted person is received into custody by the institutional division, the institutional division shall send the convicting court the record of the person's progress, conduct, and conformity to institutional division rules.

(c) The judge's recommendation that a person be placed in the state boot camp program created under Section 499.052, Government Code, does not give the court the power to hold the Texas Department of Criminal Justice or any officer or employee of the department in contempt of court for failure to adhere to that recommendation.

Presentence Investigations

Sec. 9. (a) Except as provided by Subsection (g) of this section, before the imposition of sentence by a judge in a felony case, and except as provided by Subsection (b) of this section, before the imposition of sentence by a

judge in a misdemeanor case the judge shall direct a supervision officer to report to the judge in writing on the circumstances of the offense with which the defendant is charged, the amount of restitution necessary to adequately compensate a victim of the offense, the criminal and social history of the defendant, and any other information relating to the defendant or the offense requested by the judge. It is not necessary that the report contain a sentencing recommendation, but the report must contain a proposed client supervision plan describing programs and sanctions that the community supervision and corrections department would provide the defendant if the judge suspended the imposition of the sentence or granted deferred adjudication.

(b) The judge is not required to direct a supervision officer to prepare a report in a misdemeanor case if:

(1) the defendant requests that a report not be made and the judge agrees to the request; or

(2) the judge finds that there is sufficient information in the record to permit the meaningful exercise of sentencing discretion and the judge explains this finding on the record.

(c) The judge may not inspect a report and the contents of the report may not be disclosed to any person unless:

(1) the defendant pleads guilty or nolo contendere or is convicted of the offense; or

(2) the defendant, in writing, authorizes the judge to inspect the report.

(d) Before sentencing a defendant, the judge shall permit the defendant or his counsel to read the presentence report.

(e) The judge shall allow the defendant or his attorney to comment on a presentence investigation or a postsentence report and, with the approval of the judge, introduce testimony or other information alleging a factual inaccuracy in the investigation or report.

(f) The judge shall allow the attorney representing the state access to any information made available to the defendant under this section.

(g) Unless requested by the defendant, a judge is not required to direct an officer to prepare a presentence report in a felony case under this section if:

(1) punishment is to be assessed by a jury;

(2) the defendant is convicted of or enters a plea of guilty or nolo contendere to capital murder;

(3) the only available punishment is imprisonment; or

(4) the judge is informed that a plea bargain agreement exists, under which the defendant agrees to a punishment of imprisonment, and the judge intends to follow the agreement.

(h) On a determination by the judge that alcohol or drug abuse may have contributed to the commission of the offense, the judge shall direct a supervision officer approved by the community supervision and corrections department or the judge or a person, program, or other agency approved by the Texas Commission on Alcohol

and Drug Abuse, to conduct an evaluation to determine the appropriateness of, and a course of conduct necessary for, alcohol or drug rehabilitation for a defendant and to report that evaluation to the judge. The evaluation shall be made:

(1) after arrest and before conviction, if requested by the defendant;

(2) after conviction and before sentencing, if the judge assesses punishment in the case;

(3) after sentencing and before the entry of a final judgment, if the jury assesses punishment in the case; or

(4) after community supervision is granted, if the evaluation is required as a condition of community supervision under Section 13 of this article.

(i) A presentence investigation conducted on any defendant convicted of a felony offense who appears to the judge through its own observation or on suggestion of a party to have a mental impairment shall include a psychological evaluation which determines, at a minimum, the defendant's IQ and adaptive behavior score. The results of the evaluation shall be included in the report to the judge as required by Subsection (a) of this section.

(j) The judge by order may direct that any information and records that are not privileged and that are relevant to a report required by Subsection (a) or Subsection (k) of this section be released to an officer conducting a presentence investigation under Subsection (i) of this section or a postsentence report under Subsection (k) of this section. The judge may also issue a subpoena to

obtain that information. A report and all information obtained in connection with a presentence investigation or postsentence report are confidential and may be released only to those persons and under those circumstances authorized under Subsections (d), (e), (f), (h), (k), and (l) of this section and as directed by the judge for the effective supervision of the defendant. Medical and psychiatric records obtained by court order shall be kept separate from the defendant's community supervision file and may be released only by order of the judge.

(k) If a presentence report in a felony case is not required under this section, the judge shall direct the officer to prepare a postsentence report containing the same information that would have been required for the presentence report, other than a proposed client supervision plan and any information that is reflected in the judgment. The officer shall send the postsentence report to the clerk of the court not later than the 30th day after the date on which sentence is pronounced or deferred adjudication is granted, and the clerk shall deliver the postsentence report with the papers in the case to a designated officer of the Texas Department of Criminal Justice, as required by Section 8(a), Article 42.09.

(*l*) If a person is a sex offender, a supervision officer may release information in a presentence or postsentence report concerning the social and criminal history of the person to a person who:

(1) is licensed or certified in this state to provide mental health or medical services, including a:

(A) physician;

(B) psychiatrist;

(C) psychologist;

(D) licensed professional counselor;

(E) licensed marriage and family therapist; or

(F) certified social worker; and

(2) provides mental health or medical services for the rehabilitation of the person.

(m) In this section, "sex offender" means a person who has been convicted or has entered a plea of guilty or nolo contendere for an offense under any one of the following provisions of the Penal Code:

(1) Section 20.04(a)(4) (Aggravated Kidnapping), if the person committed the offense with the intent to violate or abuse the victim sexually;

(2) Section 21.08 (Indecent Exposure);

(3) Section 21.11 (Indecency with a Child);

(4) Section 22.011 (Sexual Assault);

(5) Section 22.021 (Aggravated Sexual Assault);

(6) Section 25.02 (Prohibited Sexual Conduct);

(7) Section 30.02 (Burglary), if:

(A) the offense is punishable under Subsection (d) of that section; and

(B) the person committed the offense with the intent to commit a felony listed in this subsection;

(8) Section 43.25 (Sexual Performance by a Child); or

(9) Section 43.26 (Possession or Promotion of Child Pornography).

Authority to Impose, Modify, or Revoke Community Supervision

Sec. 10. (a) Only the court in which the defendant was tried may grant community supervision, impose conditions, revoke the community supervision, or discharge the defendant, unless the judge has transferred jurisdiction of the case to another court with the latter's consent. Except as provided by Subsection (d) of this section, only the judge may alter conditions of community supervision. In a felony case, only the judge who originally sentenced the defendant may suspend execution thereof and place the defendant under community supervision pursuant to Section 6 of this article. If the judge who originally sentenced the defendant is deceased or disabled or if the office is vacant and the judge who originally sentenced the defendant is deceased or disabled or if the office is vacant and a motion is filed in accordance with Section 6 of this article, the clerk of the court shall promptly forward a copy of the motion to the presiding judge of the administrative judicial district for that court, who may deny the motion without a hearing or appoint a judge to hold a hearing on the motion.

(b) After a defendant has been placed on community supervision, jurisdiction of the case may be transferred to a court of the same rank in this state having geographical jurisdiction where the defendant is residing or where a violation of the conditions of community supervision occurs. Upon transfer, the clerk of the court of original jurisdiction shall forward a transcript of such

portions of the record as the transferring judge shall direct to the court accepting jurisdiction, which latter court shall thereafter proceed as if the trial and conviction had occurred in that court.

(c) Any judge of a court having geographical jurisdiction where the defendant is residing or where a violation of the conditions of community supervision occurs may issue a warrant for his arrest, but the determination of action to be taken after arrest shall be only by the judge of the court having jurisdiction of the case at the time the action is taken.

(d) A judge that places a defendant on community supervision may authorize the supervision officer supervising the defendant or a magistrate appointed by the district courts in the county that give preference to criminal cases to modify the conditions of community supervision for the limited purpose of transferring the defendant to different programs within the community supervision continuum of programs and sanctions.

(e) If a supervision officer or magistrate modifies the conditions of community supervision, the officer or magistrate shall deliver a copy of the modified conditions to the defendant, shall file a copy of the modified conditions with the sentencing court, and shall note the date of delivery of the copy in the defendant's file. If the defendant agrees to the modification in writing, the officer or magistrate shall file a copy of the modified conditions with the district clerk and the conditions shall be enforced as modified. If the defendant does not agree to the modification in writing, the supervision officer or magistrate shall refer the case to the judge of the court for

modification in the manner provided by Section 22 of this article.

(j-3) Deleted by Acts 1993, 73rd Leg., ch. 900, § 4.01, eff. Sept. 1, 1993.

Basic Conditions of Community Supervision

Sec. 11. (a) The judge of the court having jurisdiction of the case shall determine the conditions of community supervision and may, at any time, during the period of community supervision alter or modify the conditions. The judge may impose any reasonable condition that is designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate, or reform the defendant. Conditions of community supervision may include, but shall not be limited to, the conditions that the defendant shall:

(1) Commit no offense against the laws of this State or of any other State or of the United States;

(2) Avoid injurious or vicious habits;

(3) Avoid persons or places of disreputable or harmful character;

(4) Report to the supervision officer as directed by the judge or supervision officer and obey all rules and regulations of the community supervision and corrections department;

(5) Permit the supervision officer to visit him at his home or elsewhere;

(6) Work faithfully at suitable employment as far as possible;

(7) Remain within a specified place;

(8) Pay his fine, if one be assessed, and all court costs whether a fine be assessed or not, in one or several sums;

(9) Support his dependents;

(10) Participate, for a time specified by the judge in any community-based program, including a community-service work program under Section 16 of this article;

(11) Reimburse the county in which the prosecution was instituted for compensation paid to appointed counsel for defending him in the case, if counsel was appointed, or if he was represented by a county-paid public defender, in an amount that would have been paid to an appointed attorney had the county not had a public defender;

(12) Remain under custodial supervision in a community corrections facility, obey all rules and regulations of such facility, and pay a percentage of his income to the facility for room and board;

(13) Pay a percentage of his income to his dependents for their support while under custodial supervision in a community corrections facility;

(14) Submit to testing for alcohol or controlled substances;

(15) Attend counseling sessions for substance abusers or participate in substance abuse treatment services in a program or facility approved or licensed by the Texas Commission on Alcohol and Drug Abuse;

(16) With the consent of the victim of a misdemeanor offense or of any offense under Title 7, Penal Code,[1] participate in victim-defendant mediation;

(17) Submit to electronic monitoring;

(18) Reimburse the general revenue fund for any amounts paid from that fund to a victim, as defined by Article 56.01 of this code, of the defendant's offense or if no reimbursement is required, make one payment to the fund in an amount not to exceed $50 if the offense is a misdemeanor or not to exceed $100 if the offense is a felony;

(19) Reimburse a law enforcement agency for the analysis, storage, or disposal of raw materials, controlled substances, chemical precursors, drug paraphernalia, or other materials seized in connection with the offense;

(20) Pay all or part of the reasonable and necessary costs incurred by the victim for psychological counseling made necessary by the offense or for counseling and education relating to acquired immune deficiency syndrome or human immunodeficiency virus made necessary by the offense;

(21) Make one payment in an amount not to exceed $50 to a crime stoppers organization as defined by Section 414.001, Government Code, and as certified by the Crime Stoppers Advisory Council; and

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[1] V.T.C.A., Penal Code § 28.01 et seq.

(22) Submit a blood sample or other specimen to the Department of Public Safety under Subchapter G, Chapter 411, Government Code,[2] for the purpose of creating a DNA record of the defendant.

(b) A judge may not order a defendant to make any payments as a term or condition of community supervision, except for fines, court costs, restitution to the victim, and other conditions related personally to the rehabilitation of the defendant or otherwise expressly authorized by law. The court shall consider the ability of the defendant to make payments in ordering the defendant to make payments under this article.

(c) If the judge or jury places a defendant on community supervision, the judge shall require the defendant to demonstrate to the court whether the defendant has an educational skill level that is equal to or greater than the average skill level of students who have completed the sixth grade in public schools in this state. If the judge determines that the defendant has not attained that skill level, the judge shall require as a condition of community supervision that the defendant attain that level of educational skill, unless the judge determines that the defendant lacks the intellectual capacity or the learning ability to ever achieve that level of skill.

(d) If the judge places a defendant on community supervision and the defendant is determined to have a mental illness or be a person with mental retardation by an examining expert under Article 16.22 or Section 3, Article 46.02, of this code or in a psychological evaluation

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[2] V.T.C.A., Government Code § 411.141 et seq.

conducted under Section 9(i) of this article, the judge may require the defendant as a condition of community supervision to submit to outpatient or inpatient mental health or mental retardation treatment if the:

(1) defendant's:

(A) mental impairment is chronic in nature; or

(B) ability to function independently will continue to deteriorate if the defendant does not receive mental health or mental retardation services; and

(2) judge determines, in consultation with a local mental health or mental retardation services provider, that appropriate mental health or mental retardation services for the defendant are available through the Texas Department of Mental Health and Mental Retardation under Section 534.053, Health and Safety Code, or through another mental health or mental retardation services provider.

(e) A judge granting community supervision to a defendant required to register as a sex offender under Chapter 62 shall require the registration as a condition of community supervision.

(f) A judge may not require a defendant to undergo an orchiectomy as a condition of community supervision.

(g) to (k) [Blank].

(*l*)(1) If the court grants community supervision to a person convicted of an offense under Section 42.072, Penal Code, the court may require as a condition of community supervision that the person may not:

(A) communicate directly or indirectly with the victim; or

(B) go to or near the residence, place of employment, or business of the victim or to or near a school, day-care facility, or similar facility where a dependent child of the victim is in attendance.

(2) If the court requires the prohibition contained in Subdivision (1)(B) of this subsection as a condition of community supervision, the court shall specifically describe the prohibited locations and the minimum distances, if any, that the person must maintain from the locations.

Confinement as a Condition of Community Supervision

Sec. 12. (a) If a judge having jurisdiction of a misdemeanor case requires as a condition of community supervision that the defendant submit to a period of confinement in a county jail, the period of confinement may not exceed 30 days. If a judge having jurisdiction of a felony case requires as a condition of community supervision that the defendant submit to a period of confinement in a county jail, the period of confinement may not exceed 180 days.

(b) A judge that requires as a condition of community supervision that the defendant serve a term in a community corrections facility under Section 18 of this article may not impose a term of confinement under this section that, when added to the term imposed under Section 18, exceeds 24 months.

(c) A judge may impose confinement as a condition of community supervision under Subsection (a) of this section on placing the defendant on supervision or at any time during the supervision period. The judge may impose periods of confinement as a condition of community supervision in increments smaller than the maximum periods provided by Subsection (a) of this section but may not impose periods of confinement that if added together exceed the maximum periods provided by Subsection (a).

DWI Community Supervision

Sec. 13. (a) A judge granting community supervision to a defendant convicted of an offense under Chapter 49, Penal Code, shall require as a condition of community supervision that the defendant submit to:

(1) not less than three days of confinement in county jail if the defendant was punished under Section 49.09(a); not less than 10 days of confinement in county jail if the defendant was punished under Section 49.09(b) or (c); or not less than 30 days of confinement in county jail if the defendant was convicted under Section 49.07; and

(2) an evaluation by a supervision officer or by a person, program, or facility approved by the Texas Commission on Alcohol and Drug Abuse for the purpose of having the facility prescribe and carry out a course of conduct necessary for the rehabilitation of the defendant's drug or alcohol dependence condition.

(b) A judge granting community supervision to a defendant convicted of an offense under Section 49.08, Penal Code, shall require as a condition of community supervision that the defendant submit to a period of confinement of not less than 120 days.

(c) If the director of a facility to which a defendant is referred under Subdivision (2) of Subsection (a) of this section determines that the defendant is not making a good faith effort to participate in a program of rehabilitation, the director shall notify the judge that referred the defendant of that fact.

(d) If a judge requires as a condition of community supervision that the defendant participate in a prescribed course of conduct necessary for the rehabilitation of the defendant's drug or alcohol dependence condition, the judge shall require that the defendant pay for all or part of the cost of such rehabilitation based on the defendant's ability to pay. The judge may, in its discretion, credit such cost paid by the defendant against the fine assessed. In making a determination of a defendant's ability to pay the cost of rehabilitation under this subsection, the judge shall consider whether the defendant has insurance coverage that will pay for rehabilitation.

(e) The confinement imposed shall be treated as a condition of community supervision, and in the event of a sentence of confinement upon the revocation of community supervision, the term of confinement served may not be credited toward service of such subsequent confinement.

(f) If a judge grants community supervision to a defendant convicted of an offense under Sections

49.04-49.08, Penal Code, and if before receiving community supervision the defendant has not submitted to an evaluation under Section 9 of this article, the judge shall require the defendant to submit to the evaluation as a condition of community supervision. If the evaluation indicates to the judge that the defendant is in need of treatment for drug or alcohol dependency, the judge shall require the defendant to submit to that treatment as a condition of community supervision in a program or facility approved or licensed by the Texas Commission on Alcohol and Drug Abuse or in a program or facility that complies with standards established by the community justice assistance division of the Texas Department of Criminal Justice, after consultation by the division with the commission.

(g) A jury that recommends community supervision for a person convicted of an offense under Sections 49.04-49.08, Penal Code, may recommend that any driver's license issued to the defendant under Chapter 173, Acts of the 47th Legislature, Regular Session, 1941 (Article 6687b, Vernon's Texas Civil Statutes), not be suspended.

(h) If a person convicted of an offense under Sections 49.04-49.08, Penal Code is placed on community supervision, the judge shall require, as a condition of the community supervision, that the defendant attend and successfully complete before the 181st day after the day community supervision is granted an educational program jointly approved by the Texas Commission on Alcohol and Drug Abuse, the Department of Public Safety, the Traffic Safety Section of the Texas Department of Transportation, and the community justice assistance division

of the Texas Department of Criminal Justice designed to rehabilitate persons who have driven while intoxicated. The Texas Commission on Alcohol and Drug Abuse shall publish the jointly approved rules and shall monitor, coordinate, and provide training to persons providing the educational programs. The Texas Commission on Alcohol and Drug Abuse is responsible for the administration of the certification of approved educational programs and may charge a nonrefundable application fee for the initial certification of approval and for renewal of a certificate. The judge may waive the educational program requirement or may grant an extension of time to successfully complete the program that expires not later than one year after the beginning date of the person's probation,[1] however, if the defendant by a motion in writing shows good cause. In determining good cause, the judge may consider but is not limited to: the defendant's school and work schedule, the defendant's health, the distance that the defendant must travel to attend an educational program, and the fact that the defendant resides out of state, has no valid driver's license, or does not have access to transportation. The judge shall set out the finding of good cause for waiver in the judgment. If a defendant is required, as a condition of community supervision, to attend an educational program or if the court waives the educational program requirement, the court clerk shall immediately report that fact to the Department of Public Safety, on a form prescribed by the department, for inclusion in the person's driving record. If the court grants an extension

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[1] A reference to "probation" means "community supervision", pursuant to Acts 1993, 73rd Leg., ch. 900, § 4.04.

of time in which the person may complete the program, the court clerk shall immediately report that fact to the Department of Public Safety on a form prescribed by the department. The report must include the beginning date of the person's community supervision. Upon the successful completion of the educational program, the person shall give notice to the community supervision and corrections department. The department shall then forward the notice to the court clerk. The court clerk shall then report the date of successful completion of the educational program to the Department of Public Safety for inclusion in the defendant's driving record. If the department does not receive notice that a defendant required to complete an educational program has successfully completed the program within the period required by this section, as shown on department records, the department shall revoke the defendant's driver's license, permit, or privilege or prohibit the person from obtaining a license or permit, as provided by Section 24(g)(2), Chapter 173, Acts of the 47th Legislature, Regular Session, 1941 (Article 6687b, Vernon's Texas Civil Statutes). The department may not reinstate a license suspended under this subsection unless the person whose license was suspended makes application to the department for reinstatement of the person's license and pays to the department a reinstatement fee of $50. The department shall remit all fees collected under this subsection to the comptroller for deposit in the general revenue fund. This subsection does not apply to a defendant if a jury recommends community supervision for the defendant and also recommends that the defendant's driver's license not be suspended.

(i) If a person convicted of an offense under Sections 49.04-49.08, Penal Code, is placed on community supervision, the court may require as a condition of community supervision that the defendant have a device installed, on the motor vehicle owned by the defendant or on the vehicle most regularly driven by the defendant, that uses a deep-lung breath analysis mechanism to make impractical the operation of the motor vehicle if ethyl alcohol is detected in the breath of the operator and that the defendant not operate any motor vehicle that is not equipped with that device. If the person is convicted of an offense under Sections 49.04-49.06, Penal Code, and punished under Section 49.09(a) or (b), Penal Code, or of a second or subsequent offense under Section 49.07 or 49.08, Penal Code, and the person after conviction of either offense is placed on community supervision, the court shall require as a condition of community supervision that the defendant have the device installed on the appropriate vehicle and that the defendant not operate any motor vehicle unless the vehicle is equipped with that device. Before placing on community supervision a person convicted of an offense under Sections 49.04-49.08, Penal Code, the court shall determine from criminal history record information maintained by the Department of Public Safety whether the person has one or more previous convictions under Sections 49.04-49.08, Penal Code, or has one previous conviction under Sections 49.04-49.07, Penal Code, or one previous conviction under Section 49.08, Penal Code. If the court determines that the person has one or more such previous convictions, the court shall require as a condition of community supervision that the defendant have that device installed on the

motor vehicle owned by the defendant or on the vehicle most regularly driven by the defendant and that the defendant not operate any motor vehicle unless the vehicle is equipped with the device described in this subsection. The court shall require the defendant to obtain the device at the defendant's own cost before the 30th day after the date of conviction unless the court finds that to do so would not be in the best interest of justice and enters its findings on record. The court shall require the defendant to provide evidence to the court within the 30-day period that the device has been installed on the appropriate vehicle and order the device to remain installed on that vehicle for a period not less than 50 percent of the supervision period. If the court determines the offender is unable to pay for the device, the court may impose a reasonable payment schedule not to exceed twice the period of the court's order. The Department of Public Safety shall approve devices for use under this subsection. The provisions of Section 23A(f), Chapter 173, Acts of the 47th Legislature, Regular Session, 1941 (Article 6687b, Vernon's Texas Civil Statutes), apply to the approval of a device under this subsection and the consequences of that approval. Notwithstanding the provisions of this section, if a person is required to operate a motor vehicle in the course and scope of the person's employment and if the vehicle is owned by the employer, the person may operate that vehicle without installation of an approved ignition interlock device if the employer has been notified of that driving privilege restriction and if proof of that notification is with the vehicle. This employment exemption does not apply, however, if the business

entity that owns the vehicle is owned or controlled by the person whose driving privilege has been restricted.

(j) The judge shall require a defendant who is punished under Section 49.09, Penal Code, as a condition of community supervision, to attend and successfully complete an educational program for repeat offenders approved by the Texas Commission on Alcohol and Drug Abuse. The Texas Commission on Alcohol and Drug Abuse shall adopt rules and shall monitor, coordinate, and provide training to persons providing the educational programs. The Texas Commission on Alcohol and Drug Abuse is responsible for the administration of the certification of approved educational programs and may charge a non-refundable application fee for initial certification of approval or for renewal of the certification. The judge may waive the educational program requirement only if the defendant by a motion in writing shows good cause. In determining good cause, the judge may consider the defendant's school and work schedule, the defendant's health, the distance that the defendant must travel to attend an educational program, and whether the defendant resides out of state or does not have access to transportation. The judge shall set out the finding of good cause in the judgment. If a defendant is required, as a condition of community supervision, to attend an educational program, the court clerk shall immediately report that fact to the Department of Public Safety, on a form prescribed by the department, for inclusion in the defendant's driving record. The report must include the beginning date of the defendant's community supervision. On the successful completion of the educational program for repeat offenders, the defendant shall give notice to the

community supervision and corrections department. The community supervision and corrections department shall then forward the notice to the court clerk. The court clerk shall then report the date of successful completion of the educational program to the Department of Public Safety for inclusion in the defendant's driving record. If the Department of Public Safety does not receive notice that a defendant required to complete an educational program has successfully completed the program for repeat offenders within the period required by the judge, as shown on department records, the department shall revoke the defendant's driver's license, permit, or privilege or prohibit the defendant from obtaining a license or permit, as provided by Section 24(g)(2), Chapter 173, Acts of the 47th Legislature, Regular Session, 1941 (Article 6687b, Vernon's Texas Civil Statutes).

(k) Notwithstanding Section 24(g), Chapter 173, Acts of the 47th Legislature, Regular Session, 1941 (Article 6687b, Vernon's Texas Civil Statutes), if the judge, under Subsection (h) or (j) of this section, permits or requires a defendant punished under Section 49.09, Penal Code, to attend an educational program as a condition of community supervision, or waives the required attendance for such a program, and the defendant has previously been required to attend such a program, or the required attendance at the program had been waived, the judge nonetheless shall order the suspension of the driver's license, permit, or operating privilege of that person for a period determined by the judge according to the following schedule:

(1) not less than 90 days or more than 365 days, if the defendant is convicted under Sections 49.04-49.08, Penal Code; or

(2) not less than 180 days or more than two years, if the defendant is punished under Section 49.09, Penal Code.

(*l*) If the Department of Public Safety receives notice that a defendant has been required or permitted to attend a subsequent educational program under Subsection (h), (j), or (k) of this section, although the previously required attendance had been waived, but the judge has not ordered a period of suspension, the department shall suspend the defendant's driver's license, permit, or operating privilege, or shall issue an order prohibiting the defendant from obtaining a license or permit for a period of 365 days.

(m) If a judge revokes the community supervision of a defendant for an offense under Section 49.04, Penal Code, or an offense involving the operation of a motor vehicle under Section 49.07, Penal Code, and the driver's license or privilege to operate a motor vehicle has not previously been ordered by the judge to be suspended, or if the suspension was previously probated, the judge shall suspend the license or privilege for a period provided under Section 24, Chapter 173, Acts of the 47th Legislature, Regular Session, 1941 (Article 6687b, Vernon's Texas Civil Statutes). The suspension shall be reported to the Department of Public Safety as provided under Section 25, Chapter 173, Acts of the 47th Legislature, Regular Session, 1941 (Article 6687b, Vernon's Texas Civil Statutes).

(n) Notwithstanding any other provision of this section or other law, the judge who places on community supervision a defendant who is younger than 21 years of age and convicted for an offense under Sections 49.04-49.08, Penal Code, shall:

(1) order that the defendant's driver's license be suspended for 90 days beginning on the date that the person is placed on community supervision; and

(2) require as a condition of community supervision that the defendant not operate a motor vehicle unless the vehicle is equipped with the device described by Subsection (i) of this section.

Repeal of § 13(e)

Without reference to the amendment of § 13(e) by Acts 1995, 74th Leg., ch. 318, § 56, Acts 1995, 74th Leg., ch. 321, § 3.020(a) repealed § 13(e).

Community Supervision for Offense Committed Because of Bias or Prejudice

Sec. 13A. (a) A court granting community supervision to a defendant convicted of an offense for which the court has made an affirmative finding under Article 42.014 of this code shall require as a term of community supervision that the defendant:

(1) serve a term of not more than one year imprisonment in the institutional division of the Texas Department of Criminal Justice if the offense is a felony other than an offense under Section 19.02, Penal Code; or

(2) serve a term of not more than 90 days confinement in jail if the offense is a misdemeanor.

(b) The court may not grant community supervision on its own motion or on the recommendation of the jury to a defendant convicted of an offense for which the court has made an affirmative finding under Article 42.014 of this code if:

(1) the offense is murder under Section 19.02, Penal Code; or

(2) the defendant has been previously convicted of an offense for which the court made an affirmative finding under Article 42.014 of this code.

Defendants Placed on Community Supervision for Sexual Offenses Against Children

Sec. 13B. (a) If a judge grants community supervision to a defendant described by Subsection (b) and the judge determines that a child as defined by Section 22.011(c), Penal Code, was the victim of the offense, the judge shall establish a child safety zone applicable to the defendant by requiring as a condition of community supervision that the defendant:

(1) not:

(A) supervise or participate in any program that includes as participants or recipients persons who are 17 years of age or younger and that regularly provides athletic, civic, or cultural activities; or

(B) go in, on, or within a distance specified by the judge of a premises where children commonly gather,

including a school, day-care facility, playground, public or private youth center, public swimming pool, or video arcade facility; and

(2) attend psychological counseling sessions for sex offenders with an individual or organization which provides sex offender treatment or counseling as specified by or approved by the judge or the community supervision and corrections department officer supervising the defendant.

(b) This section applies to a defendant placed on community supervision for an offense:

(1) under Section 43.25 or 43.26, Penal Code;

(2) under Section 21.08, 21.11, 22.011, 22.021, or 25.02, Penal Code;

(3) under Section 20.04(a)(4), Penal Code, if the defendant committed the offense with the intent to violate or abuse the victim sexually; or

(4) under Section 30.02, Penal Code, punishable under Subsection (d) of that section, if the defendant committed the offense with the intent to commit a felony listed in Subdivision (2) or (3) of this subsection.

(c) A community supervision and corrections department officer who under Subsection (a)(2) specifies a sex offender treatment provider to provide counseling to a defendant shall contact the provider before the defendant is released, establish the date, time, and place of the first session between the defendant and the provider, and request the provider to immediately notify the officer if the defendant fails to attend the first session or any subsequent scheduled session.

(d) Notwithstanding Subsection (a)(1), a judge is not required to impose the conditions described by Subsection (a)(1) if the defendant is a student at a primary or secondary school.

(e) At any time after the imposition of a condition under Subsection (a)(1), the defendant may request the court to modify the child safety zone applicable to the defendant because the zone as created by the court:

(1) interferes with the ability of the defendant to attend school or hold a job and consequently constitutes an undue hardship for the defendant; or

(2) is broader than is necessary to protect the public, given the nature and circumstances of the offense.

(f) A community supervision and corrections department officer supervising a defendant described by Subsection (b) may permit the defendant to enter on an event-by-event basis into the child safety zone from which the defendant is otherwise prohibited from entering if:

(1) the defendant has served at least two years of the period of community supervision;

(2) the defendant enters the zone as part of a program to reunite with the defendant's family;

(3) the defendant presents to the officer a written proposal specifying where the defendant intends to go within the zone, why and with whom the defendant is going, and how the defendant intends to cope with any stressful situations that occur;

(4) the sex offender treatment provider treating the defendant agrees with the officer that the defendant should be allowed to attend the event; and

(5) the officer and the treatment provider agree on a chaperon to accompany the defendant and the chaperon agrees to perform that duty.

(g) Section 10(a) does not prohibit a community supervision and corrections department officer from altering a condition of community supervision by permitting a defendant to enter a child safety zone under Subsection (f).

(h) In this section, "playground," "premises," "school," "video arcade facility," and "youth center" have the meanings assigned by Section 481.134, Health and Safety Code.

Community Supervision for Making a Firearm Accessible to a Child

Sec. 13C. (a) A court granting community supervision to a defendant convicted of an offense under Section 46.13, Penal Code, may require as a condition of community supervision that the defendant:

(1) provide an appropriate public service activity designated by the court; or

(2) attend a firearms safety course which meets or exceeds the requirements set by the National Rifle Association as of January 1, 1995, for a firearms safety course that requires not more than 17 hours of instruction.

(b) The court shall require the defendant to pay the cost of attending the firearms safety course under Subsection (a)(2).

Child Abusers, Sex Offenders, and Family Violence Offenders; Special Conditions.

Text of § 14 as amended by Acts 1993, 73rd Leg., ch. 165, § 1

Sec. 14. (a) If the court grants probation to a person convicted of an offense described by Article 17.41(a) of this code, the court may require as a condition of probation that the defendant not directly communicate with the victim of the offense or go near a residence, school, or other location, as specifically described in the copy of terms and conditions, frequented by the victim. In imposing the condition, the court may grant the defendant supervised access to the victim. To the extent that a condition imposed under this subsection conflicts with an existing court order granting possession of or access to a child, the condition imposed under this subsection prevails for a period specified by the court granting probation, not to exceed 90 days.

(b) If the court grants probation to a person convicted of an offense under Section 21.11, 22.011, 22.021, or 22.04, Penal Code, the court may require the probationer to attend psychological counseling sessions at the direction of the probation officer and may require the probationer to pay all or a part of the reasonable and necessary costs incurred by the victim for psychological counseling made necessary by the offense, upon a finding that the probationer is financially able to make payment. Any

payments ordered under this subsection may not extend past one year from the date of the order.

(c) If the court grants probation to a person convicted of an offense involving family violence, as defined by Section 71.01, Family Code, the court may require the probationer to attend, at the direction of the probation officer, counseling sessions for the elimination of violent behavior with a licensed counselor, social worker, or other professional who has been trained in family violence intervention or to attend a battering intervention and prevention program. If the court requires the probationer to attend counseling or a program, the court shall require the probationer to begin attendance not later than the 60th day after the date the court grants probation, notify the probation officer of the name, address, and phone number of the counselor or program, and report the probationer's attendance to the probation officer. The court shall require the probationer to pay all the reasonable costs of the counseling sessions or attendance in the program on a finding that the probationer is financially able to make payment. If the court finds the probationer is unable to make payment, the court shall make the counseling sessions or enrollment in the program available without cost to the probationer. The court may also require the probationer to pay all or a part of the reasonable costs incurred by the victim for counseling made necessary by the offense, on a finding that the probationer is financially able to make payment. The court may order the probationer to make payments under this subsection for a period not to exceed one year after the date on which the order is entered.

Substance Abuse Felony Program

Text of § 14 as amended by Acts 1993, 73rd Leg., ch. 900, § 4.01; Acts 1995, 74th Leg., ch. 76, § 3.09; and Acts 1995, 74th Leg., ch. 321, §§ 3.004 and 3.005

Sec. 14. (a) If a court places a defendant on community supervision under any provision of this article as an alternative to imprisonment, the judge may require as a condition of community supervision that the defendant serve a term of confinement and treatment in a substance abuse treatment facility operated by the Texas Department of Criminal Justice under Section 493.009, Government Code. A term of confinement and treatment imposed under this section must be an indeterminate term of not more than one year or less than 90 days.

(b) A judge may impose the condition of community supervision created under this section if:

(1) the judge places the defendant on community supervision under this article;

(2) the defendant is charged with or convicted of a felony other than:

(A) a felony under Section 21.11, 22.011, or 22.021, Penal Code; or

(B) criminal attempt of a felony under Section 21.11, 22.011, or 22.021, Penal Code; and

(3) the judge makes an affirmative finding that:

(A) drug or alcohol abuse significantly contributed to the commission of the crime or violation of community supervision; and

(B) the defendant is a suitable candidate for treatment, as determined by the suitability criteria established by the Texas Board of Criminal Justice under Section 493.009(b), Government Code.

(c) If a judge requires as a condition of community supervision that the defendant serve a term of confinement and treatment in a substance abuse treatment facility under this section, the judge shall also require as a condition of community supervision that on release from the facility the defendant participate in a drug or alcohol abuse continuum of care treatment plan.

(d) The Texas Commission on Alcohol and Drug Abuse shall develop the continuum of care treatment plan.

Procedures Relating to State Jail Felony Community Supervision

Sec. 15. (a) On conviction of a state jail felony punished under Section 12.35(a), Penal Code, the judge may suspend the imposition of the sentence and place the defendant on community supervision or may order the sentence to be executed. The judge may suspend in whole or in part the imposition of any fine imposed on conviction.

(b) The minimum period of community supervision a judge may impose under this section is two years. The maximum period of community supervision a judge may impose under this section is five years, except that the judge may extend the maximum period of community supervision under this section to not more than 10 years. A judge may extend a period of community supervision

under this section at any time during the period of community supervision, or if a motion for revocation of community supervision is filed before the period of community supervision ends, before the first anniversary of the expiration of the period of community supervision.

(c) A judge may impose any condition of community supervision on a defendant that the judge could impose on a defendant placed on supervision for an offense other than a state jail felony, except that the judge may impose on the defendant a condition that the defendant submit to a period of confinement in a county jail under Section 5 or 12 of this article only if the term does not exceed 90 days.

Text of subsec. (d) effective until January 1, 1998

(d) A judge may impose as a condition of community supervision that a defendant submit at the beginning of the period of community supervision to a term of confinement in a state jail felony facility for a term of not less than 90 days or more than 180 days, or a term of not less than 90 days or more than one year if the defendant is convicted of an offense punishable as a state jail felony under Section 481.112, 481.113, 481.120, Health and Safety Code. A judge may not require a defendant to submit to both the term of confinement authorized by this subsection and a term of confinement under Section 5 or 12 of this article. For the purposes of this subsection, a defendant previously has been convicted of a felony regardless of whether the sentence for the previous conviction was actually imposed or was probated and suspended.

Text of subsec. (d) effective January 1, 1998

(d) A judge may impose as a condition of community supervision that a defendant submit at the beginning of the period of community supervision to a term of confinement in a state jail felony facility for a term of not less than 90 days or more than 180 days, or a term of not less than 90 days or more than one year if the defendant is convicted of an offense punishable as a state jail felony under Section 481.112, 481.1121, 481.113, or 481.120, Health and Safety Code. A judge may not require a defendant to submit to both the term of confinement authorized by this subsection and a term of confinement under Section 5 or 12 of this article. For the purposes of this subsection, a defendant previously has been convicted of a felony regardless of whether the sentence for the previous conviction was actually imposed or was probated and suspended.

(e) If a defendant violates a condition of community supervision imposed on the defendant under this article and after a hearing under Section 21 of this article the judge modifies the defendant's community supervision, the judge may impose any sanction permitted by Section 22 of this article, except that if the judge requires a defendant to serve a period of confinement in a state jail felony facility as a modification of the defendant's community supervision, the minimum term of confinement is 90 days and the maximum term of confinement is 180 days.

(f)(1) If a defendant violates a condition of community supervision imposed on the defendant under this article and after a hearing under Section 21 of this article

the judge revokes the defendant's community supervision, the judge shall dispose of the case in the manner provided by Section 23 of this article.

(2) The court retains jurisdiction over the defendant for the period during which the defendant is confined in a state jail. At any time after the 75th day after the date the defendant is received into the custody of a state jail, the judge on the judge's own motion, on the motion of the attorney representing the state, or on the motion of the defendant may suspend further execution of the sentence and place the defendant on community supervision under the conditions of this section.

(3) When the defendant or the attorney representing the state files a written motion requesting suspension by the judge of further execution of the sentence and placement of the defendant on community supervision, the clerk of the court, if requested to do so by the judge, shall request a copy of the defendant's record while confined from the facility director of the state jail felony facility in which the defendant is confined or, if the defendant is confined in county jail, from the sheriff. On receipt of the request, the facility director or the sheriff shall forward to the judge, as soon as possible, a full and complete copy of the defendant's record while confined. When the defendant files a written motion requesting suspension of further execution of the sentence and placement on community supervision, he shall immediately deliver or cause to be delivered a true and correct copy of the motion to the office of the attorney representing the state. The judge may deny the motion without a hearing but may not grant the motion without holding a hearing and providing the attorney representing the state

and the defendant the opportunity to present evidence on the motion.

(g) The facility director of a state jail felony facility shall report to a judge who orders a defendant confined in the facility as a condition of community supervision or as sanction imposed as a modification of community supervision under Subsection (e) not less than every 90 days on the defendant's programmatic progress, conduct, and conformity to the rules of the facility.

(h)(1) A defendant confined in a state jail felony facility does not earn good conduct time for time served in the facility.

(2) A judge may credit against any time a defendant is required to serve in a state jail felony facility time served by the defendant in county jail from the time of the defendant's arrest and confinement until sentencing by the trial court.

(3) A judge shall credit against any time a defendant is subsequently required to serve in a state jail felony facility after revocation of community supervision any time served by the defendant in a state jail felony facility after sentencing.

Community Service

Sec. 16. (a) A judge shall require as a condition of community supervision, that the defendant work a specified number of hours at a community service project or projects for an organization or organizations approved by the judge and designated by the department, unless the

judge determines and notes on the order placing the defendant on community supervision that:

(1) the defendant is physically or mentally incapable of participating in the project;

(2) participating in the project will work a hardship on the defendant or the defendant's dependents;

(3) the defendant is to be confined in a substance abuse punishment facility as a condition of community supervision; or

(4) there is other good cause shown.

(b) The amount of community service work ordered by the judge:

(1) may not exceed 1,000 hours and may not be less than 320 hours for an offense classified as a first degree felony;

(2) may not exceed 800 hours and may not be less than 240 hours for an offense classified as a second degree felony;

(3) may not exceed 600 hours and may not be less than 160 hours for an offense classified as a third degree felony;

(4) may not exceed 400 hours and may not be less than 120 hours for an offense classified as a state jail felony;

(5) may not exceed 200 hours and may not be less than 80 hours for an offense classified as a Class A misdemeanor or for any other misdemeanor for which the maximum permissible confinement, if any, exceeds

six months or the maximum permissible fine, if any, exceeds $4,000; and

(6) may not exceed 100 hours and may not be less than 24 hours for an offense classified as a Class B misdemeanor or for any other misdemeanor for which the maximum permissible confinement, if any, does not exceed six months and the maximum permissible fine, if any, does not exceed $4,000.

(c) A defendant required to perform community service under this section is not a state employee for the purposes of Article 8309g or 8309h, Revised Statutes.

(d) If the court makes an affirmative finding under Article 42.014 of this code, the judge may order the defendant to perform community service under this section at a project designated by the judge that primarily serves the person or group who was the target of the defendant. If the judge orders community service under this subsection the judge shall order the defendant to perform not less than:

(1) 100 hours of service if the offense is a misdemeanor; or

(2) 300 hours of service if the offense is a felony.

Change of Residence; Leaving the State

Sec. 17. (a) If, for good and sufficient reasons, a defendant desires to change his residence within the state, the change may be effected by application to the supervising supervision officer, which change shall be

subject to the judge's consent and subject to such regulations as the judge may require in the absence of an officer in the locality to which the defendant is transferred.

(b) Any defendant who removes himself from the state without permission of the judge having jurisdiction of the case shall be considered a fugitive from justice and shall be subject to extradition as provided by law.

Community Corrections Facilities

Sec. 18. (a) In this section, "community corrections facility" has the meaning assigned by Section 509.001, Government Code.

(b) If a judge requires as a condition of community supervision that the defendant serve a term in a community corrections facility, the term may not be more than 24 months.

(c) A defendant granted community supervision under this section may not earn good conduct credit for time spent in a community corrections facility or apply time spent in the facility toward completion of a prison sentence if the community supervision is revoked.

(d) As directed by the judge, the corrections facility director shall file with the community supervision and corrections department director a copy of an evaluation made by the director of the defendant's behavior and attitude at the facility. The director shall examine the evaluation, make written comments on the evaluation that he considers relevant, and file the evaluation and comments with the judge who granted community supervision to the defendant. If the evaluation indicates that

the defendant has made significant progress toward compliance with court-ordered conditions of community supervision, the court may release the defendant from the community corrections facility. The defendant shall serve the remainder of his community supervision under any terms and conditions the court imposes under this article.

(e) No later than 18 months after the date on which a defendant is granted community supervision under this section, the community corrections facility director shall file with the community supervision and corrections department director a copy of an evaluation made by the director of the defendant's behavior and attitude at the center. The director shall examine the evaluation, make written comments on the evaluation that he considers relevant, and file the evaluation and comments with the judge who granted community supervision to the defendant. If the report indicates that the defendant has made significant progress toward court-ordered conditions of community supervision, the judge shall modify the judge's sentence and release the defendant in the same manner as provided by Subsection (d) of this section. If the report indicates that the defendant would benefit from continued participation in the community corrections facility program, the judge may order the defendant to remain at the community corrections facility for a period determined by the judge. If the report indicates that the defendant has not made significant progress toward rehabilitation, the judge may revoke community supervision and order the defendant to the term of confinement specified in the defendant's sentence.

(f) If ordered by the judge who placed the defendant on community supervision, a community corrections

facility director shall attempt to place a defendant as a worker in a community-service project of a type described by Section 16 of this article.

(g) A defendant participating in a program under this article shall be confined in the community corrections facility at all times except for:

(1) time spent attending and traveling to and from an education or rehabilitation program as ordered by the court;

(2) time spent attending and traveling to and from a community-service project;

(3) time spent away from the facility for purposes described by this section; and

(4) time spent traveling to and from work, if applicable.

(h) A judge that requires as a condition of community supervision that the defendant serve a term in a community corrections facility may not impose a subsequent term in a community corrections facility or jail during the same supervision period that, when added to the terms previously imposed, exceeds 36 months.

(i) If a defendant participating in a program under this section is not required by the judge to deliver the defendant's salary to the restitution center director, the employer of the defendant shall deliver the salary to the director. The director shall deposit the salary into a fund to be given to the defendant on release after deducting:

(1) the cost to the center for the defendant's food, housing, and supervision;

(2) necessary travel expense to and from work and community-service projects and other incidental expenses of the defendant;

(3) support of the defendant's dependents; and

(4) restitution to the victims of an offense committed by the defendant.

Fees

Sec. 19. (a) Except as otherwise provided by this subsection, a judge granting community supervision shall fix a fee of not less than $25 and not more than $40 per month to be paid to the court by the defendant during the community supervision period. The judge may make payment of the fee a condition of granting or continuing the community supervision. The judge may waive or reduce the fee or suspend a monthly payment of the fee if the judge determines that payment of the fee would cause the defendant a significant financial hardship.

(b) The judge shall deposit the fees received under Subsection (a) of this section in the special fund of the county treasury, to be used for the same purposes for which state aid may be used under Chapter 76, Government Code.

(c) A judge receiving a defendant for supervision as authorized by Article 42.11 of this code may impose on the defendant any term of community supervision authorized by this article and may require the defendant to pay the fee authorized by Subsection (a) of this section. Fees received under this section shall be deposited in the same manner as required by Subsection (b) of this section.

(d) For the purpose of determining when fees due on conviction are to be paid to any officer or officers, the placing of the defendant on community supervision shall be considered a final disposition of the case, without the necessity of waiting for the termination of the period of community supervision.

(e) If the judge grants community supervision to a defendant convicted of an offense under Section 21.08, 21.11, 22.011, 22.021, 25.02, 43.25, or 43.26, Penal Code, the judge shall require as a condition of community supervision that the defendant pay to the community corrections and supervision department officer supervising the defendant a community supervision fee of $5 each month during the period of community supervision. The fee is in addition to court costs or any other fee imposed on the defendant.

(f) A community corrections and supervision department shall remit fees collected under Subsection (e) of this section to the comptroller. The comptroller shall deposit the fee in the special revenue fund to the credit of the sexual assault program established under Section 44.0061, Health and Safety Code.

(g) If the judge places on community supervision a person required to register as a sex offender under Chapter 62, the judge shall require as a condition of community supervision that the person pay to the person's supervising officer a fee that equals the actual cost to the applicable local law enforcement authority for providing notice for publication to a newspaper as required by Chapter 62. A community supervision and corrections

department shall remit fees collected under this subsection to the applicable local law enforcement authority to reimburse the authority for the actual cost incurred by the authority, as evidenced by written receipt, for providing notice for publication to a newspaper as required by Chapter 62. In a community supervision revocation hearing at which it is alleged only that the person violated the terms of community supervision by failing to make a payment under this subsection, the inability of the person to pay as ordered by the judge is an affirmative defense to revocation, which the person must prove by a preponderance of the evidence.

Reduction or Termination of Community Supervision

Sec. 20. (a) At any time, after the defendant has satisfactorily completed one-third of the original community supervision period or two years of community supervision, whichever is less, the period of community supervision may be reduced or terminated by the judge. Upon the satisfactory fulfillment of the conditions of community supervision, and the expiration of the period of community supervision, the judge, by order duly entered, shall amend or modify the original sentence imposed, if necessary, to conform to the community supervision period and shall discharge the defendant. If the judge discharges the defendant under this section, the judge may set aside the verdict or permit the defendant to withdraw his plea, and shall dismiss the accusation, complaint, information or indictment against the defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of

which he has been convicted or to which he has pleaded guilty, except that:

(1) proof of the conviction or plea of guilty shall be made known to the judge should the defendant again be convicted of any criminal offense; and

(2) if the defendant is an applicant for a license or is a licensee under Chapter 42, Human Resources Code, the Texas Department of Human Services may consider the fact that the defendant previously has received community supervision under this article in issuing, renewing, denying, or revoking a license under that chapter.

(b) This section does not apply to a defendant convicted of an offense under Sections 49.04-49.08, Penal Code, or a defendant convicted of an offense punishable as a state jail felony.

Violation of Community Supervision: Detention and Hearing

Sec. 21. (a) At any time during the period of community supervision the judge may issue a warrant for violation of any of the conditions of the community supervision and cause a defendant convicted under Section 43.02, Penal Code, or under Chapter 481, Health and Safety Code, or Sections 485.031 through 485.035, Health and Safety Code, or placed on deferred adjudication after being charged with one of those offenses, to be subject to the control measures of Section 81.083, Health and Safety Code, and to the court-ordered-management provisions of Subchapter G, Chapter 81, Health and Safety Code.

(b) At any time during the period of community supervision the judge may issue a warrant for violation of any of the conditions of the community supervision and cause the defendant to be arrested. Any supervision officer, police officer or other officer with power of arrest may arrest such defendant with or without a warrant upon the order of the judge to be noted on the docket of the court. A defendant so arrested may be detained in the county jail or other appropriate place of confinement until he can be taken before the judge. Such officer shall forthwith report such arrest and detention to such judge. If the defendant has not been released on bail, on motion by the defendant the judge shall cause the defendant to be brought before the judge for a hearing within 20 days of filing of said motion, and after a hearing without a jury, may either continue, extend, modify, or revoke the community supervision. A judge may revoke the community supervision of a defendant who is imprisoned in a penal institution without a hearing if the defendant in writing before a court of record in the jurisdiction where imprisoned waives his right to a hearing and to counsel, affirms that he has nothing to say as to why sentence should not be pronounced against him, and requests the judge to revoke community supervision and to pronounce sentence. In a felony case, the state may amend the motion to revoke community supervision any time up to seven days before the date of the revocation hearing, after which time the motion may not be amended except for good cause shown, and in no event may the state amend the motion after the commencement of taking evidence at the hearing. The judge may continue the

hearing for good cause shown by either the defendant or the state.

(c) In a community supervision revocation hearing at which it is alleged only that the defendant violated the conditions of community supervision by failing to pay compensation paid to appointed counsel, community supervision fees, court costs, restitution, or reparations, the inability of the defendant to pay as ordered by the judge is an affirmative defense to revocation, which the defendant must prove by a preponderance of evidence.

(d) A defendant has a right to counsel at a hearing under this section.

Continuation or Modification

Sec. 22. (a) If after a hearing under Section 21 of this article a judge continues or modifies community supervision after determining that the defendant violated a condition of community supervision, the judge may impose any other conditions the judge determines are appropriate, including:

(1) a requirement that the defendant perform community service for a number of hours specified by the court under Section 16 of this article, or an increase in the number of hours that the defendant has previously been required to perform under those sections in an amount not to exceed double the number of hours permitted by Section 16;

(2) an increase in the period of community supervision, in the manner described by Subsection (b) of this section;

(3) an increase in the defendant's fine, in the manner described by Subsection (d) of this section; or

(4) the placement of the defendant in a substance abuse felony punishment program operated under Section 493.009, Government Code, if:

(A) the defendant is convicted of a felony other than:

(i) a felony under Section 21.11, 22.011, or 22.021, Penal Code; or

(ii) criminal attempt of a felony under Section 21.11, 22.011, or 22.021, Penal Code; and

(B) the judge makes an affirmative finding that:

(i) drug or alcohol abuse significantly contributed to the commission of the crime or violation of community supervision; and

(ii) the defendant is a suitable candidate for treatment, as determined by the suitability criteria established by the Texas Board of Criminal Justice under Section 493.009(b), Government Code.

(b) If the judge imposes a sanction under Subsection (a)(4) of this section, the judge shall also impose a condition requiring the defendant on successful completion of the program to participate in a drug or alcohol abuse continuum of care program.

(c) The judge may extend a period of community supervision under this section as often as the judge determines is necessary, but the period of community supervision in a first, second, or third degree felony case may not

exceed 10 years and, except as otherwise provided by this subsection, the period of community supervision in a misdemeanor case may not exceed three years. The judge may extend the period of community supervision in a misdemeanor case for any period the judge determines is necessary, not to exceed an additional two years beyond the three-year limit, if the defendant fails to pay a previously assessed fine, costs, or restitution and the judge determines that extending the period of supervision increases the likelihood that the defendant will fully pay the fine, costs, or restitution. A court may extend a period of community supervision under this section at any time during the period of supervision or, if a motion for revocation of community supervision is filed before the period of supervision ends, before the first anniversary of the date on which the period of supervision expires.

(d) A judge may impose a sanction on a defendant described by Subsection (a)(3) of this section by increasing the fine imposed on the defendant. The original fine imposed on the defendant and an increase in the fine imposed under this subsection may not exceed the maximum fine for the offense for which the defendant was sentenced. The judge shall deposit money received from an increase in the defendant's fine under this subsection in the special fund of the county treasury to be used for the same purposes for which state aid may be used under Chapter 76, Government Code.

Extending Supervision Period for Sex Offenders

Sec. 22A. (a) If a defendant is placed on community supervision after receiving a grant of deferred adjudication for or being convicted of an offense under Section 21.11, 22.011, or 22.021, Penal Code, at any time during the period of community supervision, the judge may extend the period of community supervision as provided by this section.

(b) If at a hearing at which the defendant is provided the same rights as are provided a defendant at a hearing under Section 21 the judge determines that the defendant has not sufficiently demonstrated a commitment to avoid future criminal behavior and that the release of the defendant from supervision would endanger the public, the judge may extend the period of supervision for a period not to exceed 10 additional years.

(c) A judge may extend a period of community supervision under this section only once; however, the judge may extend a period of community supervision for a defendant under both Section 22(c) and this section, and the prohibition in Section 22(c) against a period of community supervision in a felony case exceeding 10 years does not apply to a defendant for whom community supervision is increased under this section or under both Section 22(c) and this section.

Revocation

Sec. 23. (a) If community supervision is revoked after a hearing under Section 21 of this article, the judge may proceed to dispose of the case as if there had been no

community supervision, or if the judge determines that the best interests of society and the defendant would be served by a shorter term of confinement, reduce the term of confinement originally assessed to any term of confinement not less than the minimum prescribed for the offense of which the defendant was convicted. The judge shall enter the amount of restitution or reparation owed by the defendant on the date of revocation in the judgment in the case.

(b) No part of the time that the defendant is on community supervision shall be considered as any part of the time that he shall be sentenced to serve. The right of the defendant to appeal for a review of the conviction and punishment, as provided by law, shall be accorded the defendant at the time he is placed on community supervision. When he is notified that his community supervision is revoked for violation of the conditions of community supervision and he is called on to serve a sentence in a jail or in the institutional division of the Texas Department of Criminal Justice, he may appeal the revocation.

Sec. 24. Expired.

Secs. 25 to 28. [Blank].